S. HRG. 98-1278

AMENDMENTS TO THE FREEDOM OF INFORMATION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

S. 1335

A BILL TO PROVIDE CERTAIN STANDARDS FOR THE APPLICATION OF THE FREEDOM OF INFORMATION ACT EXEMPTION FOR CLASSIFIED INFORMATION

AND

S. 2395

A BILL TO AMEND THE FREEDOM OF INFORMATION ACT TO PROVIDE FOR THE PROTECTION FROM DISCLOSURE OF RECORDS RELATED TO TERRORISM AND FOREIGN COUNTERINTELLIGENCE

APRIL 3, 1984

Serial No. J-98-108

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

39-388 O WASHINGTON : 1985

S521-57

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AMENDMENTS TO THE FREEDOM OF INFORMATION ACT

TUESDAY, APRIL 3, 1984

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:38 a.m., in room SD-228, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Grassley, Leahy, Durenberger, and Denton.

Staff present: Dick Bowman, counsel; Stephen J. Markman, chief counsel and staff director; Randall R. Rader, general counsel; Deroy Murdock, staff assistant, and Carol Epps, chief clerk.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. On February 27, 1984, the Senate unanimously approved S. 774, the Freedom of Information Reform Act. This legislation, which is now pending before the House Government Operations Committee, would enact important protections for confidential investigations and informants.

This bill sprang from evidence supplied in nine hearings over a span of two Congresses. This evidence presented by the FBI Director and others substantiated that, to quote a Senate Judiciary study, "Informants are rapidly becoming an extinct species because of fear that their identities will be revealed in response to a FOIA request." Moreover, in the words of the Attorney General's Task Force on Violent Crime, FOIA is used by lawbreakers to "evade criminal investigation or to retaliate against informants."

As the Senate committee report on S. 774 states:

> Five other studies concluded that the FOIA has harmed the ability of law enforcement officers to enlist informants and carry out confidential investigations.

This hearing is scheduled as an ongoing oversight of the Freedom of Information Act. Specifically, the subcommittee will today consider two bills: S. 2395, Senator Denton's bill, providing a specific exemption for terrorism and foreign counterintelligence, and S. 1335, Senator Durenberger's bill, altering the current first exemption which protects classified information.

Since the subcommittee will have the opportunity to hear from the authors of these two proposals, I will only describe these bills in the briefest fashion.

S. 2395 would create a new exemption in FOIA for information "related to investigations of terrorism or concerned with foreign counterintelligence." It also eliminates the provision of FOIA requiring the release of any information "reasonably segregable" from the exempt portions of a sensitive document. S. 1335 provides that classified information will only be subject to exemption from a FOIA request if the classifying agency can show a "reasonable expectation of identifiable damage to national security" should the documents be released. Furthermore, the classifying agency must demonstrate, under S. 1335, that the need to protect the information outweighs any interest in disclosure of the information.

The subcommittee is pleased to hear from witnesses on these important issues and looks forward to House hearings and subsequent passage of S. 774. Since the Senate has determined the issues covered by S. 774 in detail and determined unanimously that S. 774 is a responsible and necessary change in FOIA, we are confident that the House will reach a similar conclusion when it takes an in-depth look at S. 774 and the problems it addresses.

I would like to put into the record statements by Senator Thurmond and Senator Grassley.

[The following was received for the record:]

PREPARED STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, CHAIRMAN, COMMITTEE ON THE JUDICIARY

Mr. Chairman: Today we begin consideration of two bills which propose amendments to the Freedom of Information Act. Both of these measures, S. 1335 and S. 2395, propose changes to Section 552(b) of Title 5 of the United States Code and, if enacted, would have an impact upon our national security.

It is my belief that matters pertaining to the security of this Nation should have the highest priority. In light of the recent bombing of the Capitol and the increased threat of terrorist activity in an open society, such as ours, it is imperative that the Federal government increase its efforts to ensure the continuation of domestic order and provide for the national defense. This activity necessarily entails the collection of information pertaining to those persons and organizations responsible for the planning and execution of terrorist acts.

In order to afford greater protection to collected information and those who provide it, it may be necessary to amend the Freedom of Information Act. The proposal by the distinguished Senator from Alabama, Senator Denton, may be one way by which we may help to guarantee that national security information is protected from disclosure to those who seek to create disorder and undermine the United States government. Under the provisions of his bill, it would no longer be possible for terrorist agents to piece together information useful to them from the so-called "reasonably segregable portions" of information which must be disclosed after the deletion of exempted data.

Mr. Chairman, I commend you for holding this hearing on these two proposals and I look forward to hearing from today's slate of witnesses.

PREPARED STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Mr. Chairman: As we all know, the control and release of information is becoming an increasingly important issue in our communications oriented society. When Congress first enacted the Freedom of Information Act in 1966 it was to assure our citizenry that as a democratic government we will operate in the open . . . allowing the public maximum access to government information.

Since then we have struggled to balance that effort to facilitate an informed public with protection of national security, confidential business concerns and privacy of individuals. That is a very delicate balance. I think any of us who were involved over the past several years in evaluating reforms of the Freedom of Information Act would agree.

Mr. Chairman, you and the rest of my colleagues on this subcommittee, are to again be commended for the FOIA reform measure which recently passed the Senate. It is a package of improvements in our nation's information policy which reflect the varied interests and suggestions of many groups. While I am in full support of that package and hope that the House will soon consider it favorably, I realize there are issues which were not addressed in that measure.

I am pleased that we are continuing to evaluate some of those issues, and most specifically that balance between the effective protection against terrorist and counterintelligence activity and openness of our government's function. I look forward to hearing out witnesses thoughts on those issues today. Thank you Mr. Chairman.

II

98TH CONGRESS
1ST SESSION

S. 1335

To provide certain standards for the application of the Freedom of Information Act exemption for classified information.

IN THE SENATE OF THE UNITED STATES

MAY 19 (legislative day, MAY 16), 1983

Mr. DURENBERGER (for himself, Mr. BIDEN, Mr. COHEN, Mr. HUDDLESTON, Mr. LEAHY, Mr. MATHIAS, and Mr. MOYNIHAN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To provide certain standards for the application of the Freedom of Information Act exemption for classified information.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Freedom of Information Protection Act of 1983".

SEC. 2. Subparagraph (B) of section 522(a)(4) of title 5, United States Code, is amended—

(1) by inserting in the second sentence after "court shall" a comma and "except as provided in the third sentence of this subparagraph"; and

(2) by adding at the end thereof the following new sentence: "In the case of agency records withheld under the exemption set forth in paragraph (1) of subsection (b), the court determination with respect to subparagraph (C) of such paragraph shall be limited to ascertaining whether the agency withholding such records made the determination that the records are matters described in such subparagraph.".

SEC. 3. Paragraph (1) of section 522(b) of title 5, United States Code, is amended to read as follows:

"(1) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are—

"(A) in fact properly classified pursuant to such Executive order,

"(B) matters the disclosure of which could reasonably be expected to cause identifiable damage to national security, and

"(C) matters in which the need to protect the information outweighs the public interest in disclosure.".

O

II

98TH CONGRESS
2D SESSION

S. 2395

To amend the Freedom of Information Act to provide for the protection from disclosure of records related to terrorism and foreign counterintelligence.

IN THE SENATE OF THE UNITED STATES

MARCH 7 (legislative day, MARCH 5), 1984

Mr. DENTON introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the Freedom of Information Act to provide for the protection from disclosure of records related to terrorism and foreign counterintelligence.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (b) of section 552 of title 5, United States Code, is amended—

(1) by striking out "or" at the end of paragraph (8);

(2) by striking out the period at the end of paragraph (9) and inserting in lieu thereof a semicolon;

(3) by adding after paragraph (9) the following new paragraph:

"(10) related to the investigation of terrorism or concerned with foreign counterintelligence operations."; and

(4) by striking out the second sentence thereof.

○

Senator HATCH. Our first witness today will be Mr. Raymond Wannall, former Assistant Director of the Federal Bureau of Investigation.

Mr. Wannall, we will turn to you at this point and take your testimony. You will be testifying, as I understand it, on S. 2395.

Mr. WANNALL. Yes, Senator.

STATEMENT OF W. RAYMOND WANNALL, FORMER ASSISTANT DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Mr. WANNALL. Mr. Chairman, I appreciate the opportunity to appear in support of Senate bill 395, which would amend the Freedom of Information Act to provide for the protection from disclosure of records related to terrorism and foreign counterintelligence.

My interest in this stems from 33 years and 7 months' service in the Federal Bureau of Investigation. I entered the Bureau as a special agent in July 1942, and 5 years later, was transferred to the Intelligence Division at FBI Headquarters, where I served for the next 28½ years. I held every position from agent supervisor to Assistant Director heading the Division, which position I occupied when I retired on February 27, 1976.

During the last year, I began to observe the debilitating effects on the Nation's security of the 1974 amendments to the Freedom of Information Act, FOIA, and the Privacy Act. May I cite just two examples.

First, an industrialist in a gulf coast State had been cooperating with us in an operation launched against the United States by the Soviet KGB. He was motivated by patriotism and knew if his cooperation became known to the Russians, he could suffer serious financial losses. Upon passage of the FOIA amendments, he came to us, said he feared he might read about his cooperation the next week, the next month, or the next year in the New York Times, and, apologetically, discontinued all contact with us.

The second example: As head of the Intelligence Division, I was approached by the representatives of two friendly foreign intelligence services with a proposal their two agencies and the FBI hold a joint conference to exchange information on and ideas for combatting transnational terrorism. When they learned that there was even as much as a remote possibility that information they provided might be released under a Freedom of Information Act request, they withdrew their proposal. This was at a time when our country would have gained much from such a conference, since the two foreign services had been faced with international terrorism more extensively than had we here in the United States.

There are literally scores of examples of this type which have been furnished to this subcommittee in the past. I have in mind a document dated December 11, 1981, and captioned, "Impact of the Freedom of Information Act Upon the Federal Bureau of Investigation." This was compiled by the FBI after the appearance of Judge William H. Webster, Director of the Bureau, in an executive session of this subcommittee, in response to a request by the chairman. I have a copy of this document, containing public source material, which I will gladly turn over to this subcommittee if desired.

Senator HATCH. That document has been previously submitted in the hearing record on S. 774, the Freedom of Information Reform Act.[1]

Mr. WANNALL. The impact of the FOIA upon FBI operations can perhaps be best illustrated by the reaction of those persons who must discharge certain responsibilities placed upon them by law.

During open testimony before this subcommittee on November 12, 1981, Director Webster reported the results of a poll of 4,100 of his field agents, representing more than half of them. He said that 70.3 percent indicated the FOIA had diminished their ability to develop quality informants.

Recognizing that all FBI agents are not engaged in work requiring informant development, I would suggest that closer to 100 percent of agents so engaged have experienced this effect upon their ability.

Espionage and counterintelligence have been described as the secret war that never ends. And success in that war, as in any war, depends upon the quality of your weapons. Here, our weapons are sources, informants, agents, double agents, agents in place. If the Congress denies quality weapons to the FBI in waging this war, it must surely do so recognizing the aid and comfort it may be affording to the terrorists and to those who have promised to bury us.

I know there are Members of Congress as concerned about this problem as any of us who spent our careers in the intelligence services. The chairman of this subcommittee has been an outspoken proponent of "protecting our national eyesight." In an article captioned in this manner, which appeared in the June 24, 1981, edition of "The Union Leader," he wrote:

> Without adequate intelligence services, we may find ourselves in the shoes of a blind man trying to negotiate a minefield. The real irony, however, is that we are blinding ourselves. Neither the Soviet Union nor the world's terrorist forces have done as much to damage our intelligence-gathering capabilities as our own laws and policies.

Based on a third of a century experience, I know that foreign counterintelligence and counterterrorist operations are the most difficult the FBI faces. In these areas, your opponents are highly trained and disciplined. They are taught to operate stealthily, and their plans are closely guarded against detection. To deny a legal weapon to the Bureau in its efforts to frustrate these plans is somewhat like ordering that a man-eating lion be tracked down and killed, then furnishing a BB gun to do the job.

The FOIA has, in its latest revisions, been tested for nearly 10 years, and has been found wanting in its applications to antiterrorism and counterintelligence. It was intended to open Government information to our people in our open society. What it has done in these two sensitive areas is open the doors to greater chances of success on the part of those who would steal our secrets, alter our society, influence our policies, and jeopardize lives through violence and disruption.

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[1] See p. 432, Freedom of Information Reform Act, hearings before the Subcommittee on the Constitution, Committee on the Judiciary, testimony of Hon. William H. Webster, Director, Federal Bureau of Investigation. Held Apr. 21, 1983.

When Congress amended the FOIA in 1974, the House Committee on Government Operations projected the additional costs for the entire Federal Government would amount to not more than $50,000 that fiscal year and $100,000 for each of the succeeding 5 fiscal years. The FBI alone spent $160,000 on FOIA in 1974 and is currently spending approximately $12.5 million annually. By adopting S. 2395, Congress would not be eliminating all this expenditure, for the act would still apply to FBI operations other than in the two sensitive areas of terrorism and counterintelligence.

Neither would the public be completely excluded from access to information related to these subjects. Congress enacted the Records Disposal Act of 1943, which is the basis for modern records disposition programs. Later, the Federal Records Act of 1950 made such programs mandatory for the whole Federal establishment.

Records can be destroyed only through the procedures of a disposition program. This program, which is administered by the National Archives and Records Service, known as NARS, recognizes that Government records contain a wealth of data and source materials basic to scholarly and technical research in almost every conceivable field.

The FBI has regularly for many years transferred records to NARS, where guides, inventories, lists, and indexes are prepared and made available to persons wanting to use the records. A trained reference staff is ready to aid researchers in finding and using the material desired.

Adoption of S. 2395 would not eliminate the functioning of the Records Acts of 1943 and 1950. The review requirements of the Executive order relating to classification and declassification of material would assure release of FBI material in these sensitive areas to the NARS on a timely basis for review by historians and authors. The congressional oversight of the FBI would assure timely compliance.

The adoption of S. 2395 would eliminate a loophole through which individuals having interests inimical to our welfare, or a disregard therefor, have crawled in the past to the detriment of the safety of our country and its people.

Mr. Chairman, that is the end of my prepared statement. I will be pleased to answer any questions I am in a position to answer.

Senator HATCH. Well, thank you so much. We appreciate your good statement here today.

A study done by the Drug Enforcement Administration documented that 14 percent of all DEA drug investigations were aborted or significantly compromised by FOIA disclosures. Are you aware of similar damage done in the areas of terrorism or foreign counterintelligence?

Mr. WANNALL. I am aware, Senator, of the two examples I have given. I have also studied the document, which I will turn over to this committee, which contains scores and scores of such examples.

Senator HATCH. Thank you. One aspect of FOIA requires that every request for Government records be answered with specific reasons given for the failure to satisfy the request. Now, what happens if an agency is asked for records, the existence of which it cannot confirm, without damaging an investigation, or even lives?

For example, what happens if a request comes to the FBI asking for all records obtained from wiretaps performed last week in the vicinity of G Street in New York City. If the FBI even acknowledges that it has such records, it may jeopardize the investigation of the agents at the G Street location listening post.

What, in your opinion, can be done about this problem?

Mr. WANNALL. Well, that is one of the problems that has turned up quite frequently, Senator. Even acknowledging having a case under investigation has been quite detrimental to some of the investigations being pursued. If an individual writes in and asks for his own records under the Privacy Act, he must be given those records, or he must be told that they cannot be given to him under certain bases for denial. Under the Freedom of Information Act, the same thing occurs. There have been situations, for example, where a number of individuals connected with a particular organization have written in and asked for records, and in those instances where there has been a denial of a record on a particular person, they have either assumed that he is an informant, or he is, in fact, under investigation.

Senator HATCH. At our hearings in the 97th Congress, the Justice Department testified that—

> A number of law enforcement agencies have found that hostile foreign government intelligence agencies and extreme political groups have attempted to use FOIA to uncover government informants in their midst, or to discover information concerning government investigations.

Do you think that that situation which was described back in 1981 has become worse in the past few years?

Mr. WANNALL. Well, of course, I am not in a position to know that directly, because I am no longer connected with the FBI; but I know even before we left, we experienced that sort of a problem.

Senator HATCH. Well, some will undoubtedly perceive this particular bill as reducing the ability of citizens or private groups to obtain information about FBI activities. Do you think that this will substantially inhibit such individuals from monitoring Government activities, and do you feel any reduction in the amount of information about terrorism investigations available to any requester is justified by the need for confidentiality in this sensitive area?

Mr. WANNALL. Well, I certainly think that it is justified by the need to withhold the information. There have been—there were bills passed prior to the Freedom of Information Act, which I think was passed in the midsixties, originally, which provided for the release of information to persons interested in an open Government, through the Records Acts of 1943 and 1950, which I called attention to.

Senator HATCH. In the 95th Congress, Mr. Jerry Bodash appeared before Senator Nunn's committee and testified that he and others had made FOIA requests "to try to identify the informants that revealed information." When asked by Senator Nunn if they wanted this information to murder the informants, Mr. Bodash responded, "Yes."

Do you think that that kind of a comment by Mr. Bodash is typical? Do you think that it is part of the reason for the numerous requests made by terrorist groups, which you have mentioned in your testimony?

Mr. WANNALL. Well, I do not think the comment is typical, because I think persons having that intention would not admit it openly. But I surely feel that there have been cases where terrorist groups have been trying to determine through whom the Government became aware of their activities. In a group of that sort, you must get into the group before you can determine what is being done. And live informants are the lifeblood of any law enforcement agency. It is true with respect to any intelligence agency. In fact, during the review of domestic security operations by the General Accounting Office in 1974, the GAO came up with a figure of something over 60 percent of information which was utilized by the FBI came through live informant coverage.

Senator HATCH. OK. Now, we sometimes hear that the only problem with FOIA is a perception problem, meaning that some people perceive that FOIA poses a threat to informants which, in fact, it really does not. In your opinion, does the FOIA problem with law enforcement go beyond mere perceptions?

Mr. WANNALL. It surely does. There is no question that it is damaging to the coverage afforded, particularly through live informants.

Senator HATCH. Do you think reform in the area of foreign counterintelligence is as great as the need for reform of FOIA in the area of terrorism?

Mr. WANNALL. Yes, I think there is an equal need in both areas, because for the most part, terrorism being investigated today is transnational terrorism, and I think there has been a very clear showing that the persons behind that are the persons whom we are combating in our foreign counterintelligence operations.

Senator HATCH. Well, thank you so much, sir. We appreciate your testimony here.

I notice that both Senator Denton and Senator Durenberger are here. Let us call Senator Denton at this time, since we are discussing his particular bill.

Senator, we are happy to take your testimony. We welcome you before the committee, and we appreciate the work that you do in the Subcommittee on Security and Terrorism.

STATEMENT OF HON. JEREMIAH DENTON, U.S. SENATOR, STATE OF ALABAMA

Senator DENTON. Thank you very much, Mr. Chairman. It is a pleasure to work with you on that subcommittee, and I appreciate very much the opportunity to testify before you today on S. 2395, a bill I introduced on March 7, 1984, to amend and improve the Freedom of Information Act by providing for the protection against disclosure records related to terrorism and to foreign counterintelligence.

Mr. Chairman, I particularly appreciate your scheduling hearings on the bill so promptly. The issues that the bill seeks to address are matters of considerable urgency. I want to commend you, too, Mr. Chairman, and also Senator Leahy, who just came in, for the Herculean efforts that you have devoted to amending and improving the Freedom of Information Act, both in this Congress and in the 97th Congress. I am honored to have had the pleasure of

working with both of you, as I mentioned to the chairman, not only on the Subcommittee on Security and Terrorism, but on the full committee and on the floor of the Senate.

In the committee and on the floor, we labored over S. 774 as it evolved from S. 1730 in the 97th Congress. As it has evolved, we have seen the development of a consensus for its passage by the 98th Congress. The bill has been endorsed not only by the administration and the Attorney General, but also by the Washington Post in an editorial and, as we all know, those endorsements represent a broad consensus.

S. 774 was passed by the Senate by voice vote on February 27, 1984. It now awaits action in the House of Representatives, where it has been referred to the Government Operations Subcommittee on Government Information, Justice and Agriculture. Although its fate there is, as I understand it, uncertain, we can all hope for its prompt consideration and passage.

I hope you all will excuse my weak voice; I am getting over a bout with pneumonia.

Notwithstanding the broad consensus for S. 774, I noted with some concern that, along the way, two vital exemptions, exemptions for information related to terrorism and foreign counterintelligence, were dropped.

The need for those exemptions is longstanding. It has never been more crucial than now. Our Nation does face a growing threat from terrorism and from hostile foreign intelligence services. One wearies of recalling how the lives of 241 American marines were lost in Beirut, and how the Capitol was bombed by terrorists last November 7. More recently, terrorist bombings, kidnapings, and ambushes have been carried out with increasing frequency against our diplomats abroad. According to State Department statistics, terrorist incidents against U.S. persons and property abroad have taken a sharp upswing.

Here at home, the Capitol bombing last fall was most recently followed by a terrorist bombing of IBM offices in Purchase, NY, on March 20, the same day that the FBI was scheduled to report to the Senate Subcommittee on Security and Terrorism in closed session about the FBI's investigation of the Capitol bombing.

During this spring and summer, we are faced with four events, Mr. Chairman, which will provide tempting targets for terrorists: the World's Fair in New Orleans, the Summer Olympics in southern California and elsewhere, the Democratic National Convention in San Francisco, and the Republican National Convention in Dallas.

We must ensure that our intelligence and investigative agencies have the authority they need to keep track of terrorist activity, and that they have the power to prevent the disclosure of the information that they obtain.

A discussion of the threat from foreign intelligence services is perhaps more appropriate for a closed session of the subcommittee, but suffice it to say that the threat is real and growing. Senator Leahy is aware of the depth and breadth of the problem. He took pains during the closed FBI oversight hearings of the Subcommittee on Security and Terrorism to make his concerns evident both to the FBI and to the rest of us on the subcommittee. He and I have

some ideas about where improvements can be made, and I look forward to working with my distinguished colleague from Vermont on those changes, and with you, Mr. Chairman, to achieve those ends. As a first step, however, it is my opinion that we consider it imperative to provide an FOIA exemption for foreign counterintelligence information.

The need for FOIA exemptions for information related to terrorism and foreign counterintelligence was recognized during the Carter administration, when then Attorney General Benjamin Civiletti proposed establishing a moratorium on access through the Freedom of Information Act to any records related to terrorism, organized crime, and foreign counterintelligence. The need for the exemptions was also identified by the Reagan administration when it undertook its comprehensive review of the Freedom of Information Act. Provisions for the exemptions for terrorism and foreign counterintelligence information were included in S. 1751, which you, Mr. Chairman, introduced on behalf of the administration on October 20, 1981. Moreover, the Constitution Subcommittee incorporated exemptions on terrorism and foreign counterintelligence from S. 1751 into S. 1730, which you had introduced 2 weeks earlier.

After extensive hearings, the Constitution Subcommittee approved S. 1730, including the exemptions for terrorism and foreign counterintelligence information, on December 14, 1981. During the course of the seven hearings—three more hearings, incidentally, than were held in 1965 when the FOIA was originally passed—the subcommittee heard testimony from more than 50 witnesses who represented nearly every conceivable viewpoint on the strengths and weaknesses of the act.

When the terrorism and foreign counterintelligence exemptions were omitted from S. 774, I went along; I advised my colleagues on the Judiciary Committee that although I would support S. 774 as a compromise measure, with a lot of good provisions, the Senate and House needed to act quickly to protect information gathered for foreign counterintelligence purposes. And for that reason, I did introduce S. 2395.

As early as 1979, when Attorney General Civiletti and the Carter administration were pressing for a moratorium on the release of terrorism and foreign counterintelligence data, FBI Director William Webster revealed that, for that year alone, he knew of 125 cases in which individuals refused to provide the FBI with information because of fears that their names would be released under an FOIA request.

On December 10, 1981, in executive session before this subcommittee, Judge Webster described in detail several cases in which hostile foreign intelligence services, organized crime figures, members of terrorist groups, and others used the Freedom of Information Act to identify FBI informants and to frustrate FBI investigations.

The chairman then asked Judge Webster to provide for the public record a document that would reveal to the maximum extent compatible with classification and national security considerations, the specific examples about which he testified. An 80-page document, which I have here, is the result. Although the examples it contains will shock you, Mr. Chairman-—

Senator HATCH. Let us put that document in the record.

Senator DENTON. I understand it already is included in the record, Mr. Chairman. It is this one right here, called, "U.S. Department of Justice/Federal Bureau of Investigation Impact of the Freedom of Information Act Upon the Federal Bureau of Investigation," and I understand it was included in the previous hearing.

Senator HATCH. Yes it was.

Senator DENTON. This report was sanitized, and the FBI found it not possible to chronicle on the public record the manner in which the Soviet KGB and the Soviet Communist Party have used the act. Nonetheless, the examples contained in the document are astounding.

For example, a few years ago, an FBI field office notified FBI headquarters that an informant, who had furnished considerable information about the Weather Underground, was very upset about the Freedom of Information Act. He told agents that he had learned that former and current radicals were filing FOIA requests in an attempt to identify informants.

I have heard, perhaps, 100 stories like this, Mr. Chairman. His information was correct. From 1975 through 1981, over 70 members or former members of the Weathermen made FOIA requests of the FBI. In addition, the FBI released over 60,000 pages of documents about the Weather Underground to a west coast attorney who represents individuals connected with the Weather Underground.

On October 20, 1981, a Brinks' guard and two police officers were killed during the commission of an armored car robbery in Rockland County, NY. Among those who have been charged, convicted, or are being sought in connection with the incident are persons who were associated with the Weather Underground. The individuals who allegedly participated in the organization with which they were associated have made thorough use of the Freedom of Information Act. Five individuals made requests to the FBI for documents about themselves, and four of them received documents from the FBI pursuant to the Freedom of Information Act.

In another example, a person involved with an extremely violent terrorist network, and who suspected informants in the group, stated that, in an attempt to identify the informants, multiple FOIA requests would be submitted to the FBI, and the responses would be analyzed. The group has in fact begun submitting requests.

In yet another example, an FBI agent conducting a foreign counterintelligence investigation about possible loss of technology to a hostile foreign country got in touch with an American businessman about a research program being conducted by his company. The businessman was cooperative, but he refused to release a copy of a company business report to an agent, because he feared that business competitors could obtain the report through the FOIA and learn about his company's research activities.

I could cite more examples, Mr. Chairman, but the document is a matter of public record and already has been received by the subcommittee. Suffice it to say that the problem still exists and still begs for legislative relief.

Appearing before the subcommittee on April 21, 1983 to testify on S. 774, which by then no longer included exemptions for terror-

ism and foreign counterintelligence data, Judge Webster said that although the bill protected many of his bureau's interests, he still believed that further FOIA protections for terrorist and foreign counterintelligence investigations were necessary.

When he appeared before the Subcommittee on Security and Terrorism last month during the FBI authorization and oversight hearings, Judge Webster observed that he has been seeking exemptions for information in the areas of foreign counterintelligence and terrorism for 6 years, and that he would still welcome those exemptions if they could be obtained.

The FBI, Mr. Chairman, is not the only agency that needs these exemptions. Francis "Bud" Mullen, the Administrator of the Drug Enforcement Administration, has for the past 3 years been seeing more and more involvement by terrorist groups in drug trafficking all around the world. In his opinion, the connection between terrorist activity and drug trafficking is broadening. It is particularly evident in the use of illicit narcotics revenues to finance arms purchases by terrorist organizations. According to Mr. Mullen, the relief that S. 2395 would provide is "essential to law enforcement."

As you are aware, Mr. Chairman, there is not only a broadening nexus between terrorist activity and drug trafficking, but also growing evidence, developed largely by the Subcommittee on Security and Terrorism, of the involvement of foreign intelligence services in the drug business.

The DEA has conducted a detailed analysis of the effect of the Freedom of Information Act on DEA investigations. The report concluded that the FOIA has "a significant adverse effect on DEA's operation," that 60 percent of all FOIA and Privacy Act requests received by the DEA originate with criminal elements, and that 14 percent of DEA's investigations are "aborted or significantly compromised by FOIA-related problems."

The DEA report is also a matter of public record, and the subcommittee has a copy. For the sake of expediency, I will not cite details from it.

In addition to providing exemptions for terrorism and foreign counterintelligence information, S. 2395 also addresses the problems faced by agencies when they are required under the provisions of the act, to conduct a line-by-line, word-by-word review of a record in an effort to provide segregable portions of that record to an FOIA requester.

Judge Webster refers to that procedure as a "mine field process of analysis." Indeed, the review frequently requires the release of often seemingly innocuous bits of information within a document which, when pieced together with other information, could conceivably provide the one item of information that a hostile intelligence-gathering team needs to complete its mosaic.

The fact that hostile intelligence analysts can use the "mosaic" or "jigsaw puzzle" analysis to their benefit is well recognized by the courts in FOIA case law. For example, in *Halperin* v. *Central Intelligence Agency,* the U.S. court of appeals for the DC circuit noted:

> The Agency's general rationale for refusing to disclose rates and total fees paid to attorneys is that such information could give leads to information about covert activities that constitute intelligence methods. For example, if a large legal bill is in-

curred in a covert operation, a trained intelligence analyst could reason from the size of the legal bill the size and nature of the operation. This scenario raises a reasonable possibility of harm to the covert activity following from disclosure of the size of legal fees. We note that the CIA's showing of potential harm here is not so great as its showing concerning attorney names. We must take into account, however, that each individual piece of intelligence information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious important in itself. When combined with other small leads, the amount of a legal fee could well prove useful for identifying a covert transaction.

I might remark, Mr. Chairman, that in the field of military intelligence, this principle of "mosaic" has long been recognized, and men have been admonished against giving even unclassified information, either to the enemy while a prisoner of war, or in dealing with foreign agents in the United States, because of that "mosaic" problem. It takes the enemies of the United States great time and effort and manpower to put together unclassified information in the first place, but often, a piece of unclassified information, added to a series of classified and unclassified information, will complete a puzzle in the military sense. This "mosaic" concept has been recognized since the Revolutionary War, as far as I know, in terms of what you can and cannot divulge to the enemy. And yet, in the field of terrorism and foreign counterintelligence, where security is at least as sensitive, we are risking men's lives, we are blowing covers, we are blowing cases incidental to a very justifiable interest in the privacy of individuals and the first amendment. And I am not trying to in any way insinuate that the Freedom of Information Act is not needed. I am simply trying to point to what should be, I believe, a self-evident need to provide exemptions for these two features.

This subcommittee has been advised of the danger during previous hearings. I am sure you will recall the testimony of Francis J. McNamara, a widely respected expert on domestic and foreign intelligence and subversion. In pointing out to the subcommittee the "human error factor" involved in processing records for release under the FOIA, Mr. McNamara testified that he had:

> Seen FBI documents released under the FOIA in which certain names that should have been eliminated were not, I am sure inadvertently. There is at least one case in which the names of FBI agents who carried out intelligence assignments should have been deleted from FOIA documents, but were not. As a result, they ended up as defendants in a lawsuit. FBI documents turned over to the National Caucus of Labor Committees, U.S. Labor Party, revealed the AFL-CIO had given the FBI information on the group and also contained the name of a university professor who had been a Bureau source—with the result that he came under attack by the group.

The "human error factor" is a particularly glaring problem where voluminous amounts of records are being released under judicially imposed enforcement of the time constraints of the act. You will recall, for instance, when Judge Webster was testifying before this subcommittee about the Rosenberg/Meeropol FOIA case, where the sons of Julius and Ethel Rosenberg, the convicted Soviet atomic spies, had requested all FBI records on their parents. In the ensuing litigation, the judge in the case ordered the FBI to release documents at the rate of 40,000 documents a month. Judge Webster pointed out in that case there was "a great potential for human error," in his words.

By deleting the segregability provisions, then, the potential for human error, the "minefield process of analysis" referred to by Judge Webster, can be avoided. Once records are determined to be exempt from an FOIA request under one or more of the statutory exemptions, agencies will no longer be required to conduct an exhaustive word-by-word review. In addition to avoiding the problems of inadvertent disclosure, this provision will provide a collateral benefit in that it will reduce the costs of reviewing documents that are requested. Those costs, unlike the costs for search and reproduction, are currently not recoverable under the act.

The American system favors open government to the maximum extent consistent with the demands of reason and common sense. Balanced against the openness which is so vital a part of American democracy, we must weigh valid countervailing concerns about and indeed, even the public interest in, legitimate and well-established intelligence and law enforcement needs.

I fear that during the intervening years since the FOIA was enacted, the sense of balance to which I refer has eroded.

Our Government is charged with providing for the common defense and promoting the general welfare. During the past few years, in my view, we have been attempting to provide for the general welfare at the expense of our common defense.

Our Government has no higher duty, in my opinion, than to provide for the common defense. It is in that context and in that spirit that I offer S. 2395 for your consideration and solicit your support and cosponsorship of it.

Thank you once again, Mr. Chairman, for the opportunity to present my views before the subcommittee this morning, and I hope these views supplement the record and precisely state the case in favor of the exemptions.

Senator HATCH. Thank you, Senator Denton.

[The following was received for the record:]

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, March 16, 1984.

DEAR COLLEAGUE: I recently introduced S. 2395, a bill to amend and improve the Freedom of Information Act (FOIA) by providing a specific exemption disclosure for information related to terrorism and foreign counterintelligence. This legislation also deletes a current provision of 5 U.S.C. 552 that requires the release of segregable portions of a record to an FOIA requester.

On December 10, 1981, FBI Director William Webster testified before the Subcommittee on The Constitution of the Senate Judiciary Committee. He described in detail cases in which hostile foreign intelligence services, members of terrorists groups, and others have used the FOIA to identify FBI informants and frustrate FBI investigations.

As early as 1979, Judge Webster revealed that, for that year alone, he knew of 125 cases where individuals refused to provide the FBI with information because of fears that their names would be released under an FOIA request.

I firmly believe that, in order to more effectively deal with terrorists and foreign intelligence operatives, who are increasingly sophisticated in their intelligence-gathering methods, and who rejoice at the ease with which they are able to obtain sensitive information in our open, democratic society, we need to close some loopholes in the law that allow them access to information they should not have. Additionally, such requests have a chilling effect on informants who fear exposure through information released under the FOIA. These informants have become increasingly hesitant about cooperating with our law enforcement agencies.

Last year, when we were considering other amendments to the FOIA, I advised my colleagues on the Judiciary Committee that the Senate and House would need to act very soon to protect highly sensitive information gathered for foreign counterin-

telligence purposes. In some cases, the response to an FOIA request amounts to acknowledgement by the FBI that a file exists on a specific subject. Thus hostile intelligence services are put on notice that an investigation is under way or has taken place.

S. 2395 also addresses the problem of segregability. As the law stands now, records requested under the FOIA must be reviewed line-by-line to determine releasability. This type of review frequently requires the release of often seemingly innocuous information within a document, which, when pieced together with other information, could conceivably be the piece of information a hostile intelligence-gathering team needs to complete its mosaic.

The time has come to stop what amounts to giving help to terrorists and foreign intelligence services of hostile governments through provisions in a law that was never intended to be used for that purpose.

I ask that you support this bill and invite your cosponsorship of it. A copy of the bill is attached for your convenience. If you have any questions or would like to be a cosponsor, please call me, or have a member of your staff contact Jerry Everett or March Bell at 224-2673.

Sincerely,

JEREMIAH DENTON,
U.S. Senator.

Senator HATCH. I failed to recognize Senator Leahy earlier, and I apologize to him for that. Senator Leahy, do you have any opening remarks you would care to make?

Senator LEAHY. Yes; I do, most of which I will put in the record, Mr. Chairman, other than to say that Senator Durenberger and I are proposing an amendment to the FOIA, to require an agency to find that national security documents withheld "could reasonably be expected to cause identifiable damage to national security." This amendment restores the identifiable damage test contained in Executive Order 12065 for FOIA declassification decisions. It would make explicit the kind of balancing test that has always characterized critical agency decisions under FOIA. It would exempt national security matters "in which the need to protect the information outweighs the public interest in disclosure." I think that would answer the criticism of those who fear that judges will impose unreasonably high standards of specificity and thereby harm national security.

I think it codifies commonsense, and I applaud Senator Durenberger for it.

I will put the whole statement in the record, but at whatever appropriate time, I will have some questions for Senator Denton.

Senator HATCH. Without objection, so ordered.

[The following was received for the record:]

PREPARED STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT.

MR. CHAIRMAN, THE BALANCE BETWEEN THE NEEDS OF NATIONAL SECURITY AND THE PUBLIC'S NEED TO KNOW HAS ALWAYS BEEN A DELICATE ONE. THIS COMMITTEE'S HARD WORK ON FOIA LEGISLATION IN THIS CONGRESS AND THE LAST HAS BROUGHT THIS ISSUE HOME TO ALL OF US. BUT S. 774 DID NOT PURPORT TO DEAL WITH THE ISSUES RAISED BY THE BILL NOW BEFORE US, S. 1335.

THE FREEDOM OF INFORMATION ACT ESTABLISHES A PRESUMPTION IN FAVOR OF ACCESS, CONSTRAINED ONLY BY A SERIES OF NARROWLY-DRAWN EXEMPTIONS, WHERE THE NEED TO KEEP GOVERNMENT INFORMATION SECRET CLEARLY OUTWEIGHED THE PUBLIC'S RIGHT TO KNOW.

PRESIDENT REAGAN'S EXECUTIVE ORDER 12356 ON CLASSIFYING NATIONAL SECURITY INFORMATION HAD THE EFFECT OF REVERSING THAT PRESUMPTION. IN DOING SO, THE ORDER REVERSED A TREND TOWARDS GREATER OPENNESS OF 30 YEARS, A PERIOD WHICH SPANNED SIX ADMINISTRATIONS. EXECUTIVE ORDER 12356 DID MORE THAN JUST TO CREATE THE RISK THAT ZEALOUS OFFICIALS WILL OVERCLASSIFY. FOIA HAS ONLY WORKED BECAUSE THE BURDEN ON AN AGENCY TO JUSTIFY A DECISION IN FAVOR OF SECRECY PUTS A MAMMOTH GOVERNMENT AND ITS CITIZENS ON AN EQUAL FOOTING. SHIFTING THE BURDEN TO THE PUBLIC WILL HAVE THE INEVITABLE EFFECT OF UPSETTING THAT BALANCE AND GIVING GOVERNMENT ITS NATURAL ADVANTAGES IN THE FIGHT FOR ACCESS: SIZE AND RESOURCES.

CONGRESS NOW HAS THE OPPORTUNITY, AND I BELIEVE THE STRONGEST DUTY, TO RESTORE THE FOIA EXEMPTION FOR NATIONAL DEFENSE AND FOREIGN POLICY MATTERS TO ITS FORMER MEANING AND TO MAINTAIN THE PRESUMPTION OF OPENNESS. AND YET, BUILDING ON MORE THAN 15 YEARS OF EXPERIENCE WITH THE ACT, WE CAN MAKE THOSE CHANGES IN A WAY THAT PERPETUATE AND INDEED STRENGTHEN THE PROTECTION REQUIRED FOR DOCUMENTS THAT CLEARLY AND LEGITIMATELY REQUIRE CLASSIFICATION ON SECURITY GROUNDS.

SENATOR DURENBERGER AND I ARE PROPOSING AN AMENDMENT TO THE FREEDOM OF INFORMATION ACT THAT WOULD REQUIRE AN AGENCY TO FIND THAT NATIONAL SECURITY DOCUMENTS WITHHELD "COULD REASONABLY BE EXPECTED TO CAUSE IDENTIFIABLE DAMAGE TO NATIONAL SECURITY." THIS AMENDMENT RESTORES THE IDENTIFIABLE DAMAGE TEST CONTAINED IN EXECUTIVE ORDER 12065 FOR FOIA DECLASSIFICATION DECISIONS.

SECOND, OUR PROPOSAL WOULD MAKE EXPLICIT THE KIND OF BALANCING TEST THAT HAS ALWAYS CHARACTERIZED CRITICAL AGENCY DECISIONS UNDER FOIA. OUR BILL WOULD EXEMPT NATIONAL SECURITY MATTERS "IN WHICH THE NEED TO PROTECT THE INFORMATION OUTWEIGHS THE PUBLIC INTEREST IN DISCLOSURE." COURTS REVIEWING AGENCY COMPLIANCE WITH THE BALANCING TEST REQUIREMENT WOULD NOT BE ABLE TO SUBSTITUTE THEIR JUDGMENT FOR THAT OF THE DECISIONMAKER BUT WOULD BE LIMITED TO ASCERTAINING THAT THE TEST WAS IN FACT MADE. THIS SHOULD CLEARLY ANSWER THE CRITICISM OF THOSE WHO FEAR THAT JUDGES WILL IMPOSE UNREASONABLY HIGH STANDARDS OF SPECIFICITY AND THEREBY HARM NATIONAL SECURITY.

I ALWAYS HESITATE TO URGE MY COLLEAGUES TO CODIFY COMMONSENSE, AS THIS BILL ADMITTEDLY DOES. BUT THE PRESIDENT'S EXECUTIVE ORDER HAS MADE THIS PROPOSAL NECESSARY. STATUTES LIKE THE FREEDOM OF INFORMATION ACT WORK BEST WHEN THEY ENJOY THE GOOD WILL OF THE ADMINISTRATION AND THE AGENCIES CHARGED WITH THEIR IMPLEMENTATION. IN THE ABSENCE OF EVIDENCE THAT THE PRESUMPTION OF OPENNESS WILL BE HELD HIGH AS A STANDARD, THE PRESENT BILL BECOMES CRUCIAL.

I THINK THAT BOTH GOVERNMENT AND REQUESTERS WOULD BENEFIT FROM ADOPTING THE CAREFUL STANDARD SENATOR DURENBERGER AND I HAVE SET FORTH IN THE PRESENT BILL. IF THIS STANDARD BECOMES PART OF THE FOIA, BOTH NATIONAL SECURITY AND THE PRINCIPLE OF OPENNESS WILL BE THE BENEFICIARIES.

I WANT TO OFFER MY PERSONAL THANKS TO SENATOR DURENBERGER, WHOSE ROLE ON THE INTELLIGENCE COMMITTEE HAS BEEN VITAL AND WHOSE PERCEPTIONS ABOUT THE BALANCE BETWEEN THE NEEDS OF SECURITY ON THE ONE HAND AND THE PUBLIC'S RIGHT TO KNOW ON THE OTHER HAVE BEEN AN EXAMPLE TO ALL OF US.

Senator HATCH. Let me just ask Senator Denton one question, and then I will turn to you, Senator Leahy—and Senator Durenberger, we are going to take your statement right after Senator Denton's.

Senator Denton, the U.S. News & World Report devoted the cover of its January 9 issue to the prospect that the U.S. mainland might become the next target for widespread terrorism. Do you think that this is a genuine prospect, and do you think that this bill will have any influence on that prospect?

Senator DENTON. There are very few targets left for terrorism, other than the mainland of the United States. Certainly, terrorism is rampant throughout the Western Hemisphere except, I would say, in North America. It is rampant in many parts of Africa; and throughout Southeast Asia. If you consider that totalitarian Communist societies are ruled by terrorism, which I think is a valid assumption, then all you have left is the free world and Europe. And you have seen Turkey, Italy, West Germany, and other free nations subject to, perhaps, 50 times the terrorism per capita or proportionality and sizewise, than the United States has undergone. So, we may have been preserved, Mr. Chairman, in my view, up through this point, as a relatively sleeping giant, in that if I were a Soviet planner—and their average age is even older than mine, by maybe 15 to 20 years—they have been around a long time. They do not play chess carelessly. They are, Mr. Chairman—and this is the foremost conclusion of mine since I have come to the Senate—eroding U.S. interests by conducting terrorism abroad at a rate which, were the American public aware of that rate, we would be very, very aware and conscious of the need to squelch terrorism not only within our own continental limits, but to take a more active role, not necessarily militarily, but an active role in supporting antiterrorist activities abroad, where our interests are being hurt very severely.

But the very questions of yours goes to the heart of the problem, of when the Soviets would find it most advantageous to awaken the United States to that fact. I am coming out with facts soon which I hope you will find interesting—others have—former Secretary Haig was in my office the other day, and I showed him some quantification of the results in the U.S. economy of certain derivations of terrorism, and he was amazed and said he had been working on that in general, but did not have it quantified that much.

It is my belief, Mr. Chairman, that we would not have had 241 marines killed in Beirut had the United States been subjected to something like half the terrorism that Turkey has. We would have thought about such an attack as being a likelihood, a contingency against which we should protect ourselves.

So I did not share in the condemnation of the marines or the Marine Commandant for not dreaming that up; I think that the marines suffer from the same syndrome that the rest of us do.

Your question deals directly with that, and I cannot predict when the Soviet Union would choose to stop cooling major efforts of terrorism against the United States. They do not direct worldwide terrorism, but to the degree that it exists, exported from Nicaragua into El Salvador, certainly they are involved through Havana and Managua. I do not believe they would want it to

happen, or have not wanted it to happen, up to now, because they want us to remain a sleeping giant. However, we do have Cuba assisting drug traffic into the United States, with one purpose of that being the bartering for arms for the M–19 terrorists in Colombia, and others in Latin America. We have proven that Castro and the very top of the Cuban Government are involved with that. It has not been given a great deal of attention in the press, but that has happened. We have terrorism from—allegedly, and I think somewhat convincingly established evidentially, at least in the early stages—of Soviet use of surrogates such as Bulgaria, and some very hideous terroristic plots, including complicity in the assassination attempt on His Holiness, John Paul II.

So the question you ask is the $64 trillion question. It is self-evident to you, to me, to the Soviets, that our open society, our very small percentage of police, FBI, and so on, lends itself to terrorism. The question is, When do they want to let us see into the glaring horror, the maw, the mouth, of terrorism?

I do not know. I do know that four remarkably tempting events occur this year, which organizations other than those which are controlled by, in any way, the Soviet Union, such as the Armenians, who might take off against the Turks, such as any number of groups in the Mideast, which may or may not have any support in the Soviet Union—even if the Soviet Union would be against their striking, they could choose to strike with devastating effects at any one of those four events with unprecedented results.

So I think you have asked a good question, and I do not consider myself capable of making the prediction, but I think that the remarks with which I surrounded my effort to get at your question are important ones.

Senator HATCH. Thank you.

Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman.

Senator Denton, I appreciate your support of S. 774. I know you are familiar with the provisions which relate to the law enforcement community.

Are you aware that the bill contains a change in the language of exemption 7(a) to provide that information which could reasonably be expected to interfere with a law enforcement investigation could be withheld?

Senator DENTON. I am informed that the problem is that some of those investigations are terminated, and when they are terminated, they are subject to the kinds of disclosure to which I have been referring.

Senator LEAHY. Well, are you aware that the FBI believes that this change will help protect the random bits of information which, in the hands of a knowledgeable criminal like a person in organized crime, with their banks of computers and all, could lead to the identification of an informant?

Senator DENTON. I am sorry, I did not catch the first part of the question.

Senator LEAHY. Are you aware that the FBI believes that the change we made in S. 774 would help protect those random bits of information and that before, there had been a concern that organized crime especially could take these random bits of information

and find out the identity of an informant—are you aware that with the changes we have made in S. 774, the FBI now feels that we have improved that situation substantially?

Senator DENTON. I am aware and was elated by the progress made toward organized crime in this respect, to which you seem to be directing the bulk of your attention. But I am also aware that the FBI, as I have reviewed throughout my statement, is still anxious to get provisions made by which would be exempted the areas of foreign counterintelligence and terrorism.

Senator LEAHY. Are you also aware, though, that the same exemption 7(a) applies to all investigations, including investigations of terrorism?

Senator DENTON. This all seems to have to do with the investigations being closed, Senator Leahy, and once closed, subject to the requests for information which S. 2395 would guard against.

Senator LEAHY. Well, are you also aware that it contains language in the 7(d) exemption which clarifies the Bureau's authority to protect confidential sources; it contains a provision which excludes third party requests for informant files, whether they are maintained under name or other personal identification.

The reason I ask these questions—it seems that we have answered most, if not all, of the concerns you have raised, and this, of course, is an area that Senator Hatch and I, on the law enforcement part, worked very closely on, with a great deal of cooperation from the Attorney General and the Director of the FBI——

Senator HATCH. Senator, if you could yield on that for a second.

Senator LEAHY [continuing]. And I think we were trying very much to correct the problems. I am hoping that we do not end up now so scattering our direction that we run into a situation where nothing ends up passing this Congress.

Senator HATCH. If you would yield on that point, Director Webster did say that he thought S. 774 would solve many problems, but he also indicated that there are other areas where reform is needed or may be needed, and he listed terrorism as one of those areas. He seemed happy with the progress of S. 774, but I do not think he meant to foreclose any other corrections or reforms.

Senator DENTON. That is my belief, Mr. Chairman, if I may say so in answer to Senator Leahy. If things were all that honky-dory, I do not know why the CIA is requiring in S. 1324 protection of themselves with respect to disclosures involving counterintelligence.

Senator LEAHY. Well, of course, the Director of the CIA stated publicly that he prefers doing away with FOIA entirely, so you might feel that probably has some involvement there. But we have worked very closely with the CIA and others, in trying to get through legislation—and did get through legislation, certainly, through the Senate Intelligence Committee—which, if I take their public and private testimony at face value, as I do, they were in favor of. But I wonder whether perhaps a question might be raised that your legislation may go too far. Your bill would exempt from disclosure records about medicare fraud or records about a State government which allows jobless workers to continue receiving extended unemployment benefits.

Do we really want that to happen, because so often, those kinds of fraud things are turned up by the press or independent investigators or others, and not by the congressional watchdogs. I raise that question.

Senator DENTON. Well, if the Senator is reading my bill, I do not know where he is reading anything about Social Security. This is one of the most brief bills in legislative history, and the operative thing which it adds is "related to the investigation of terrorism or concerned with foreign counterintelligence operations," period. It does not have any effect on Social Security or any of the other matters you mention.

Senator LEAHY. Here is a copy of the exact bill itself. The fourth line, by striking out the second sentence, "thereof," if you go back to the bill and read what that does, it eliminates the requirement of reasonably segregated documents. Couldn't that cover just about anything? Are we painting with too broad a brush?

Senator DENTON. My understanding is that that "reasonably segregable" part has to have fallen under a previously specified exemption before it becomes an applicable clause or phrase.

Senator LEAHY. But it does, of course, apply to every record in the Federal Government.

I would like to put a number of articles into the record for which references could not have been written if the requirement to reasonably segregate documents did not exist.

Senator HATCH. Without objection, we will put those in the record.

[The following were received for the record:]

[From the Vermont Vanguard Press, April 8, 1980]

Scope

The Census-FBI Pipeline

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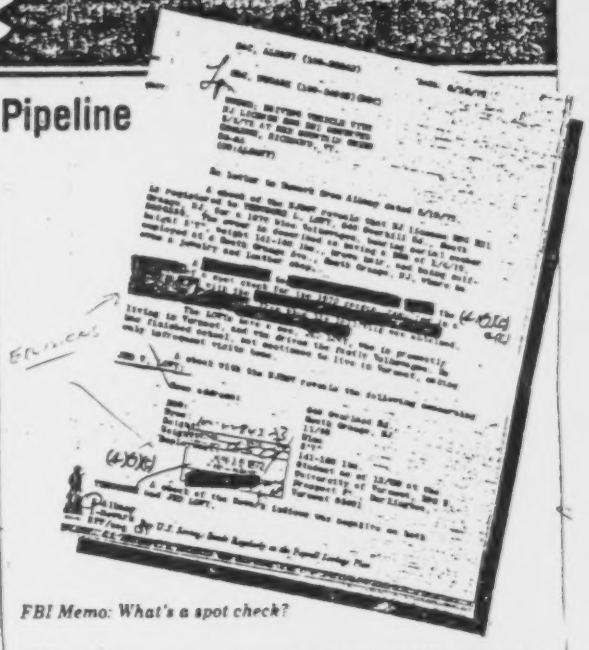
BURLINGTON

INFORMATION PROvided to the government on census forms is supposed to be strictly confidential for 72 years. On the forms sent to just about every American, the Department of Commerce says that census workers can be fined or imprisoned for violating this 60-year-old law.

Nevertheless, a Burlington man has discovered that in 1972 the Federal Bureau of Investigation (FBI) used a "spot check" of the 1970 census to identify him during an investigation of a "commune" the Bureau considered a gathering spot for "extremists." In documents obtained via the Freedom of Information Act (FOIA), Jed Lowy, a family nurse practitioner at the Community Health Center, found that the FBI was attempting to identify the driver of a blue 1970 Volkswagon. "This vehicle has previously been observed at New Left locations in Vermont," notes a report dated May 19.

To find out who was driving the car, the Albany FBI office contacted its Newark, N.J. counterpart. Discovering that the car belonged to a 53-year-old man (Lowy's father), they initiated a search to see who might be driving it.

A report from Newark to Albany, dated June 16, contains the following admission: "A (deleted) to (deleted) the (deleted) of a spot check for the 1970 census resulted in a (deleted) with the (deleted) from whom the following was obtained." The information included Lowy's name, the fact that he had finished school and continued to live in Vermont, and that he drove the family VW. How much information came from the census is unclear, but the FBI explained in a letter to Lowy that the deleted portions of the memo referred to other people whose privacy rights were being protected and the



FBI Memo: What's a spot check?

were used.

Once the FBI had Lowy's name, they were able to zero in on him through the New Jersey Department of Motor Vehicles. The investigation into his associations continued for another six months.

The file on Lowy was not closed immediately, despite the lack of any direct evidence of his involvement with "extremists," because the FBI thought that he was part-owner of the Fresh Ground Coffee House. It was thought at the time to be "a known conduct [illegible] and associated with the Red Mountain Green Commune... in view of his identification as a partner in the coffee house it is recommended that this case be reopened for additional investigation..."

Later in the same year, two FBI agents conducted a physical surveillance of the restaurant, and according to Lowy and others, eventually tried to interview several people who frequented the place. Lowy's file was closed in December, 1972.

Although there have been exceptions to the confidentiality law governing use of census

rounded up in 1940) the law for decades has been that no data can be revealed to anyone outside the Bureau of the Census in a form that identifies individuals. Jim Price of the FBI's Washington, D.C. office said, when asked about the Bureau's policy, that "the FBI does not utilize census information. Period." Told about the existence of the Lowy memo, Price asked for time to do some research. He subsequently said that the FBI has not had access to the census, but that he is "not at liberty to discuss documents that the FBI has."

Price did not deny the existence of the memo or the mention of the census "spot check."

It is not known whether this alleged violation of census law is an isolated occurrence or part of a pattern. Linda Lotz of the Campaign for Political Rights says that researchers on FBI activities have so far found no other references to the census in documents from the Bureau.

Lowy is not sure what he or his father will do about the census issue, but plans to secure legal advice. "I just think this should become public information," he says.

[From the Vermont Vanguard Press, April 22, 1980]

Nation

FBI's Census Cover May Spark Probe

By Greg Guma

More light was shed on the case of the 1970 census, the FBI and a memo uncovered by a Burlington man when the government released a less deleted version of the controversial document last week.

After Jed Lowy discovered a reference to census "spot check" in a document obtained via the Freedom of Information Act (FOIA), the FBI and Census Bureau denied that confidential data had been used. It took a week, however, for the government to take action to clear up the case. That involved sacrificing portions of the memo which had been deleted under legal exemptions. What the memo shows is that, "A pretext call to 640 Overland Avenue (the Lowy family home in New Jersey), under the auspicies of a spot check for the 1970 census, resulted in a conversation with the maid, EDNA PRATHER, 517 South 21st Street, Irvington, N.J., from whom the following was obtained."

Posing as a census worker, the FBI agent, whose name is still deleted, apparently learned from the maid that Jed Lowy was living in Vermont and driving the family Volkswagen. The vehicle, seen at homes and public places under surveillance, had sparked the so-called New Left investigation.

The FBI says the use of "pretext interviews" was legal, but that FBI Director William Webster has reemphasized to all field offices that posing as a census worker is now prohibited. Nonetheless, Rep. James Jeffords has written to the chairpersons of subcommittees on the census and constitutional rights, suggesting that "oversight hearings may well be in order." Specifically, Jeffords wants to know whether such impersonation was (or is) a common practice and if posing as an employee of some other federal agency should be formally prohibited in the pending FBI charter.

Despite the Bureau's claims, some congressional staffers say that posing as a census worker violates census law. If that is correct, the techniques, according to 1977 FBI guidelines, weren't supposed to be covered up in the first place. ■

Rob Swanson

Jed Lowy's file showed a pattern of surveillance and yet another FBI abuse.

[From the New York Times, Jan. 9, 1983]

NEW CASE OF NAZI CRIMINAL USED AS SPY BY UNITED STATES IS UNDER STUDY

(By Ralph Blumenthal)

For the second time in a year, the Justice Department's Office of Special Investigations has begun an inquiry into the use of a Nazi war criminal by American intelligence authorities after World War II.

The new investigation involves Robert Jan Verbelen, a Belgian SS officer and police commandant who was tried in his absence, convicted and sentenced to death for war crimes by a Belgian military court in 1947.

According to newly available United States Army documents, Mr. Verbelen worked for American counterintelligence in Vienna under a false identity from 1947 to 1956. Whether his alias was assigned to him by American agents who knew who he was—as he maintains—or whether he was successful in fooling his intelligence superiors for nine years—as Army documents indicate—are among the questions under investigation.

The 72-year-old Mr. Verbelen, who still lives in Vienna, said in a telephone interview Friday that he had organized an American spy network of 100 Soviet-bloc agents in Vienna after the war. But he denied having committed any of the crimes, including killing of Jews and mistreatment of two captured American pilots, for which he was convicted in what he portrayed as a seven-minute trial. In 1965 he was cleared by an Austrian court in the slaying of seven members of the Belgian underground.

ARMY RECORDS HEAVILY CENSORED

The Army records long classified and still heavily censored, were obtained through a Freedom of Information request by the Anti-Defamation League of B'nai B'rith. Justin J. Finger, an official of the Jewish rights group said, in calling for a Federal investigation that Mr. Verbelen still "speaks and writes regularly on pro-Nazi issues." Mr. Verbelen disputed the charge.

Stephen S. Trott, an Assistant Attorney General in the Justice Departments criminal division wrote to the Anti-Defamation League late last month that a "review" of the case was under way. It marks the second time that the special investigations office, formed in 1978 to deport Nazi war criminals living illegally in America, has been directed to examine a case involving someone outside the country.

Last August, the special investigations office issued a long report on its findings that American counterintelligence authorities in West Germany had employed Klaus Barbie, a former Gestapo leader in occupied France, and helped him escape to South America in 1951. Mr. Barbie, who had also been tried in his absence for war crimes and sentenced to death by a French court, was extradited from Bolivia to France last February and is now facing a new trial in Lyons.

An examination of the Verbelen records obtained from the Army suggests that, as with the Barbie case, at least some intelligence officials were ignorant of their agent's true identity. But because of the substantial material blacked out of the Army documents, many aspects remain hidden. It is not clear, for example, what the Army meant when it stated in some of the documents that Mr. Verbelen "was considered suitable for rehire."

DESCRIBED AS A NAZI OFFICER

Army intelligence files describing Mr. Verbelen's true identity say that he was born April 5, 1911, in Gerent Bei Lowen, Belgium and that he served as an obersturmfuhrer in both the general SS, or Nazi elite guard, and the SD, the Nazi security service. The records say he commanded a police battalion and was forming a Flemmish storm brigade when German troops occupied Belgium. During the Allied advance he fled to Germany and was seen in Berlin in November 1944.

Mr. Verbelen said in the intervew, conducted in German, that as the Nazis retreated before the Allied advance he fled to Germany and served as chief of police, with the "theoretical" rank of general, in a Flemish exile government.

Mr. Verbelen's indictment before a military court in Brussels in 1947 charged him with having ordered and taken part in killings and torture and with having attacked a farm where two American pilots were hiding. The pilots, identified as Lieut. Nuncio B. Street and Lieut. Eugene W. Dingledine, were said in court papers

to have been "subjected to physical tortures" and sent to the Buchenwald concentration camp. They were said to have been liberated later by the Russians in Berlin.

The court found Mr. Verbelen guilty of 67 charges and condemned him to "death by a bullet."

Mr. Verbelen said in the interview that he was just an anti-Resistance officer who was among thousands of Flemish officers unjustly condemned to death in mass postwar trials. He called the allegations involving the fliers "a shameless lie" and said he had never seen an American pilot during the entire war.

In 1945, according to Army records, Mr. Verbelen was hired as a bartender in a United States officers' club in Zellam See, Austria. Whether he arrived under his own name is unclear. He said in the interview that he had escaped from Germany with false papers but that he had told the Americans in Austria his true name.

That same year he began to work with what the Army records called, without elaboration, "U.S.A. Special Services" in Bad Hofgastein, Austria. That work was said to have ceased in 1946. The next sentence in Army documents is blacked out but it appears from Mr. Verbelen's own statements that this is when he took on other American intelligence duties.

At about this time, too, the papers indicated, he acquired a large number of aliases, including Alfred H. Schwab, Alfred Heinrich Gustave Schwab, Herbert Schwab, Peter Mayer, Herbert Charpentier, Josef Pollack, Alfred Kluger and Herbert Lehmann.

Mr. Verbelen said in the interview that the aliases had been given him by American intelligence officers. "When one name got too hot, I got another," he said. He said he was alluding here to the Russians, not the Belgians.

Any description of Mr. Verbelen's intelligence work for the Americans is blacked out of the Army papers made public. But in the telephone interview and in earlier accounts he said he had organized an Eastern European spy network—for "ideology," he said, not for pay—that succeeded in exposing an attempted 1950 Soviet "putsch" aimed at undermining Austrian neutrality.

But if Mr. Verbelen's aliases were given to him by Americans, it evidently came as a surprise to at least some officers of the 66th Counter-Intelligence Corps in 1956 that the man they had known since 1947 as Alfred H. Schwab was in reality somebody else.

UNDER POLICE SURVEILLANCE

The truth came out in May, 1956, after "Mr. Schwab" complained to the Americans that, according to another document, "he had been unable to carry out his work" because of surveillance by the Austrian police.

In the ensuing conversation, the document said, "following facts regarding subject, his background, and his past activities were developed:

"a. The name Alfred Schwab, by which subject was introduced to his present handling agent and which name is contained in all Allied papers [line blacked out] is not subject's true name. Subject is actually Robert Jean Verbelen a Belgian citizen and former officer in the Flemish SS (Schutzstaffel—Elite Guard)."

The Army records also indicate that he had doctored his history. At first he said he was born on Nov. 30, 1914, in Apia, German Samoa, that he attended school in Stuttgart and college in Lowen, Belgium. He said he had been a captain and recruiting officer for a German Army division, had served in SD headquarters and was a reserve commando.

When this story was found to be false in 1956, the papers show, Mr. Verbelen told another story that also contained discrepancies and fell short of the full extent of his wartime service, although he acknowledged that he had "worked closely with the SS and SD during the German occupation of Belgium."

The records show that Mr. Verbelen was discharged from American service on Dec. 13, 1956, with a payment of 5,000 schillings. No reason was given.

He said that American officers offered to arrange for him to come to the United States but that he preferred to remain in Austria. He said he then went to work for Austrian security agencies and that in recognition of his services he was awarded Austrian citizenship in 1959.

In 1965, Mr. Verbelen stood trial on war crimes charges in Vienna and was acquitted.

[From the Washington Post, Feb. 6, 1982]

My Biography—by the FBI

(By Alfred Friendly)

I have just read a biography of me that leaves my ego miserably deflated. Luckily for my reputation, it is a limited edition, under the imprimatur of the Federal Bureau of Investigation, of one copy. It contains 383 pages, 103 of which are almost illegible. The cost was $38.30. No billing was made for 20 more pages withheld in their entirety, which is fair enough, although a dime apiece for several pages like the one illustrated here smacks of sharp practice.

But my complaint lies elsewhere. I had expected that my FBI files, obtained under the Freedom of Information Act, would confirm my recollection of myself as a stunningly dangerous fellow, writing unkindly of Joe McCarthy, Pat McCarran, Martin Dies and, before they were jailed, Andrew J. May and J. Parnell Thomas. Even more sinfully, I publicly expressed admiration for the scholarship of Owen Lattimore, the genius of J. Robert Oppenheimer, the public service of Leon Henderson and the merits of a host of similar New Deal subversives. Did not all that entitle me to a AAA-I, or at least AA-I, rating as a security risk?

Not at all. The files show only the most meager evidence that the FBI ever considered nominating me. I would like to think that those 20 withheld pages and some of the blacked-out lines portrayed me as a more sinister figure, but the only solace I can find on the record is that I was enrolled on the FBI Enemy/No Contact list at a precociously early stage in my journalistic career. And even that was not for being a dangerous leftist, but for reporting that J. Edgar Hoover ran the most anti-union outfit in town, keeping it uncontaminated by government workers' unions (as it remains today) by firing any employee known to be a member, and that, by methods any child could have deduced, he kept Congress in slathering public adoration of him.

Indeed, the files suggest, the FBI's exclusive interest in me derived from my wickedness not merely in not bestowing the fundamental osculation on its chief expected of every red-blooded American boy reporter, but also in actually hinting that Hoover and his Merry Men suffered from ethical halitosis. I and, much more important, my employer, The Washington Post, did not agree with El Supremo on who were his, and therefore America's, enemies. To the extent the files are interesting at all is their repeated recording of FBI refusals to give us information or service on even the most routine and innocent requests. Louis B. Nichols, a principal Hoover lieutenant, explained the situation to me early on (although the episode is not in my files). I had asked him for an explanation of the stonewall I was encountering. He said, "If you kick a man in the groin do you expect him to be nice to you?" One may question the principles on which the FBI operated, but not its fidelity to them.

To be sure, I was twice the object of the FBI's determined attentions, but only because it was ordered to make special investigations required for those under consideration for certain levels of government jobs. Each of those inquiries seems to have set a score of agents in four different field offices into frenzied activities for three or four weeks. Any fair-to-middling newspaper reporter could have done them in a week's time, with fewer inaccuracies and a great deal more information useful to a prospective employer.

The inconsequential results may not have been due entirely to the incompetence of the investigators. Hoover had forbidden them to interview anyone connected with The Washington Post, where I had spent most of my working life and who, therefore, presumably knew most about me. It was as if the sheriff of Nottingham, seeking information about Robin Hood, forbade his deputies to talk to anyone in Sherwood Forest.

The two investigations revealed that I was a good friend of Nobelist Edward U. Condon; that somehow I had been seen with someone (the blacked-out passages were particularly heavy here) who knew the presumed Soviet agent Nathan Gregory Silvermaster; that I found Alger Hiss impressive when I met him for the first time (in 1971); that I had been fined $25 for speeding when I was in college and that my son ran a stop light when he was in college, and that (according to an FBI informant there) I had once visited Commonwealth College in Mena, Ark. The stoolie neglected to report that I there declared that the madhouse was one of the most ludicrous Far Left ventures I had ever seen, for which I was publicly denounced as a "bourgeois liberal," a breed Lenin deemed "more vicious than the reactionaries themselves."

Oh, yes. I was reported to hold liberal views consonant with the New Deal and favored civilian control of atomic energy. Otherwise, I was the living embodiment of

the Boy Scout oath and ran Nathan Hale a close second in the patriotism and loyalty sweepstakes.

Perhaps other FBI files make more sense, but mine gives the impression of the treasures of a deranged filcher of ashcans. They tell more about the FBI than about me, and as such should be more worrisome to the compilers than to the subject.

[From the Washington Post, Aug. 7, 1983]

Illinois Altered Jobless Data During 1982 Campaign

(By David Hoffman)

The administration of Illinois Gov. James R. Thompson (R) altered key unemployment statistics last year in the midst of Thompson's close reelection campaign in an effort to prevent loss of extended federal benefits to 50,000 jobless workers in the state, internal government documents show.

The alterations, which occurred at a time when unemployment was a major campaign issue, were made several days after Thompson talked by telephone with Labor Secretary Raymond J. Donovan and requested a delay in submitting the statistics to the federal government.

Donovan granted the delay, but Labor Department officials later questioned the accuracy of the data submitted by Thompson's administration, according to documents obtained by The Washington Post under the Freedom of Information Act.

One Labor Department official said there was a pattern in the statistics that had "never occurred in the history of the UI [unemployment insurance] program." Another official said Illinois "appears politically arrogant . . . apparently feeling a Republican administration will not cause problems for a Republican governor in a tough reelection race in Illinois November 2."

The alterations in the statistics triggered a criminal investigation by the Labor Department's inspector general. The investigation found evidence that the statistics had been altered improperly, but no evidence linking the alterations to Thompson or Donovan. The probe was then referred to the Justice Department's fraud section, which declined to take further action, officials said.

Neither the governor nor labor secretary was questioned in the probe, officials said, nor was Albert Angrisani, assistant secretary for employment and training, who oversees the program in question.

Thompson said this week through his spokesman, David Gilbert, that he was not aware of any improper alterations in the statistics. Gilbert said the governor's telephone call to Donovan was made strictly to obtain a week's delay in submitting the statistics. Gilbert added that "at this point no one in the governor's office has any information" that statistics were improperly altered.

"If there was any procedure that was taken that was not appropriate, we'll have to take a look at that to see what can be done, who was at fault," said Gilbert. "We'll get to the bottom of it."

Donovan refused to respond directly to queries about the case. Through his spokesman, Mike Volpe, he said he discussed the extension with Thompson, who expressed concern that "a lot of unemployed people would lose their benefits." Volpe said Donovan turned the matter over to his staff, and the delay was granted a few days later. Volpe said Donovan recalls nothing more about the telephone call.

After questions were raised last year about the statistics, the Labor Department sent auditing teams to Illinois. The state was eventually permitted to recount its unemployment claims under federal auditors' supervision. In the recount, the auditors allowed the state to include some claims that had previously been left out. Top department officials then accepted the recalculated figures, so benefits were not cut off.

But "no one paid the piper" for having made the initial alterations in the statistics, said one Labor Department source familiar with the case.

At the time, Thompson was in a hard-fought reelection campaign against Democrat Adlai E. Stevenson III. Thompson won by 5,074 votes out of 3.67 million cast—a 0.14 percent margin. The race was considered the closest in Illinois history.

The Post obtained, under the Freedom of Information Act, copies of interviews and other internal documents produced in the inspector general's investigation. However, some documents were withheld, and others the Labor Department heavily censored.

The documents describe events that began in mid-1982 when the recession was lingering and causing major political problems for Republican candidates. At the time, Thompson was the only GOP governor in the Great Lakes region seeking reelection, and Stevenson was making the economy and jobs a major issue.

Unemployment in Illinois had been rising all year, from 9.2 percent in January to 12.3 percent in October, the month before the election.

Even as the jobless situation was growing more serious, however, the state was in danger of losing its "extended jobless benefits, which provided 13 extra weeks of benefits in periods of high joblessness.

These benefits were paid after workers had exhausted the regular 26 weeeks of unemployment benefits. According to the documents, Illinois was receiving a total of $3.5 million a week in federal extended benefits.

The extended benefits were based on a complex state-by-state eligibility formula. The program was in jeopardy in Illinois because the formula was tightened in one of the federal budget cuts Reagan pushed through Congress in 1981.

If Illinois lost its eligibility, 50,000 jobless workers would lose their benefits and the payments could not be resumed for 13 weeks. The state was thus faced with the paradox of rising unemployment but the possibility of less federal aid to cope with it.

To continue qualifying for the benefits, the state submitted weekly reports to the Labor Department. These reports calculated a mathematical "trigger" that, if hit, would end the program in Illinois.

The trigger worked this way; the benefits would continue as long as 5 percent or more of all workers covered by unemployment insurance were receiving regular unemployment benefits. If the figure fell below 5 percent, the state would "trigger off" the extended benefits program.

The actual unemployment rate was higher than the 5 percent trigger level because some workers had exhausted their jobless benefits altogether, while some others were not covered by unemployment insurance.

The documents obtained by The Post, as well as interviews with some key officials, detail how the statistics were altered during several weeks in late July and early August 1982.

In a staff memorandum on July 19, 1982, Thompson was warned that the extended benefits were "likely to trigger off by the end of this week." The memo added that if this happened, Aug. 7 would thus be the last week benefits could be paid and the program could not begin again until mid-November.

Two days after that memo was written, a similar conclusion was reached by official in the Illinois Bureau of Employment Security, the state agency that administered the unemployment insurance benefits.

In a memo analyzing trends in the jobless data, the Illinois officials wrote July 21 that "it is not very likely the state would remain on the extended-benefits program. Already, for the week ending July 17, Illinois had hit the 5 percent trigger rate, the memo said. Given the downward trend in the data, ". . . We can reasonably expect the EB program to trigger OFF" the next week, they said.

It is not possible to determine who wrote the memo since Labor Department officials deleted all names in releasing the documents.

The next week, Thompson's staff urgently attempted to arrange a telephone call to Labor Secretary Donovan. A July 27 memo prepared for Donovan by his staff said that Illinois was about to trigger off extended benefits. However, the governor "believes these figures are incorrect" and wanted a week's grace period in submitting the data, according to the memo.

Donovan was told by his staff that the "only solution you can offer" was to grant a week's delay. The delay was granted.

The same day, Thompson held a news conference in Chicago. According to an account in the July 28 Chicago Tribune, Thompson appealed to Illinois jobless workers who had not applied for benefits to file claims so the state would not "trigger off" extended benefits.

Thompson also said the state would use the week-long grace period to "recheck figures" that might allow Illinois to remain on extended benefits.

Labor Department investigators later interviewed officials in the Illinois Bureau of Employment Security, which prepares the data, to determine what happened in the days before and after Thompson's call.

The reports of these interviews were made available to The Post. All names and titles, as well as other information, were deleted, making it impossible to determine who was responsible for the alterations.

One official told the investigators that on July 26 a tentative computer run had shown the trigger rate was 4,997 percent. Since the Labor Department in the past had not permitted rounding off such a figure to 5 percent, Illinois would be forced off the extended benefits. Maryland had just lost extended benefits under similar circumstances.

The Illinois official said the 4,997 percent figure was immediately reported to his supervisors. But he said he was told not to send it to the Labor Department "until further notice."

The following week after Thompson's call to Donovan the official said he was ordered to prepare the report by adding into the statistics some 1,500 unemployment claims from an earlier week. This would be just enough to boost the trigger rate to exactly 5 percent, the official said.

The official told investigators that he "questioned the propriety of this adjustment" was told it was an attempt to compensate for claims that hadn't been counted earlier.

That report was submitted Aug. 2, showing a 5 percent trigger rate. It was the second time in a row Illinois hit 5 percent exactly.

The Illinois official said he used a similar method for preparing the next week's report, this time adding 4,754 extra claims, "just enough to reach the 5 percent trigger rate."

This was the third consecutive week the state hit precisely the 5 percent rate.

For the next week, the official said the report was not altered but the 4,754 claims that had been "borrowed" the previous week were not subtracted as they should have been because of a "human error."

For the fourth time, Illinois reported a trigger rate of 5 percent.

Another Illinois official whose name was also deleted in the documents is quoted as having "readily acknowledged" to the investigators that "had the claim reporting system not been altered they would have triggered off and would have lost the extended benefit eligibility for 13 weeks."

This would have meant that workers in Illinois would be without extended jobless benefits until after Election Day.

Several of the officials interviewed by the Labor Department investigators denied that Thompson's staff had ordered the changes, according to the documents.

However, one of these officials, under investigators' questioning, "conceded the political realities of a large number of individuals going off UI compensation in an election year."

The unemployment compensation program is run by the Employment and Training Administration, while the Bureau of Labor Statistics, a separate Labor Department unit, compiles and publishes federal jobless statistics.

According to the documents, one Illinois official told the investigators that the Employment and Training Administration had given the state data a "clean bill of health" in early August. The official did not say who provided it, however.

Angrisani, the assistant secretary for employment and training, did not return a reporter's telephone queries last week about the Illinois case. A spokesman for him issued a statement saying Angrisani had "simply followed" the recommendations of career professionals under him.

The Illinois data was immediately questioned by two career officials, William (Bert) Lewis, administrator of the Office of Employment Security, and Carolyn Golding, administrator of Unemployment Insurance, each of them said in an interview last week.

Lewis said the trigger statistics are "volatile" and thus unlikely to come in at the same figure two or three weeks in a row. Illinois had reported hitting the 5 percent trigger precisely in four consecutive weeks.

"It didn't take us four times" to question the data, he said. Lewis said he had never seen a comparable situation.

Another official told the Labor Department investigators that Illinois might legitimately have reported the 5 percent level the first time. But, the official said, when the state reported 5 percent the second time—in the delayed report with the 1,500 additional claims—"knowledgeable UI program people could not believe it."

Still another Labor Department official, identified in the documents only as a specialist on unemployment insurance, said his "immediate reaction and conclusion [were] that the figures were bad or fixed." This official said Illinois "appears politically arrogant . . . apparently feeling a Republican administration will not cause problems for a Republican governor in a tough reelection race in Illinois November 2."

In Illinois at the time, the explanation given publicly for the continuation of extended benefits was that enough claims had been found in a "recount" to prevent the state from "triggering off" the program.

Agaliece Miller, director of the Illinois Bureau of Employment Security, told the Chicago Sun Times Aug. 2 that "her staff in 60 filled offices had searched their mail bins and other places and had found about 2,000 additional unemployment applica-

tions." The newspaper quoted her as saying, "We squeaked through." Miller, who has retired, could not be reached for comment last week.

But the Labor Department career officials had doubts about how the state had "squeaked through."

On Aug. 12, Lewis filed an "incident report" with the inspector general's office, triggering an investigation. The report noted that Illinois officials had expected disqualification for extended benefits, but it did not occur. The report suggested that an "abnormal pattern has developed."

Lewis said last week that Illinois had, in effect, double-counted the unemployment claims for two weeks, and in the third week failed to adjust for this double-counting.

The investigation in August and September included sending a team of auditors to Illinois. On Sept. 14, the state was requested to recalculate the statistics for the weeks in question under the direct supervision of the Labor Department auditors, and in the recount the auditors allowed the state to include some unemployment claims that had previously not been included in the statistics.

Lewis said the recount was unusual in that the department had never before sent auditors and staff to oversee a state's trigger calculations.

A few days later, in a letter to Golding, the Illinois officials promised not to alter the statistics as they had done before. The recalculations showed that Illinois still qualified for extended benefits. The result was that in late September, Labor Department officials decided to approve the data.

Later, the inspector general's office forwarded the results of this investigation to the Justice Department. Officials there declined to carry it any further, according to a Justice Department spokesman who could not explain why.

"You can look at it two ways," said a Labor Department official. "The system worked" in that the altered statistics were detected. But, he said, "no one paid the piper" for making the alterations in the midst of Thompson's reelection campaign.

The Nation.

September 3-10, 1983 $1.25; U.K. 65p

The F.B.I. and Dr. Einstein

Richard Alan Schwartz

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WHAT THE FILE TELLS

The F.B.I. and Dr. Einstein

RICHARD ALAN SCHWARTZ

At the conclusion of *Hamlet*, as bodies lie strewn about the stage, Horatio announces to Fortinbras that he shall hear "Of carnal, bloody, and unnatural acts,/Of accidental judgments, casual slaughters,/Of deaths put on by cunning and forced cause,/And, in this upshot, purposes mistook/Fall'n on th'inventors' heads. All this can I/Truly deliver." The file of some 1,500 pages that the Federal Bureau of Investigation accumulated on Albert Einstein between 1932 and 1955, copies of which I obtained under the Freedom of Information Act, contains a litany of horrors as long and as unusual, though not so gory. The eminent physicist is accused of running an espionage ring, of being the "brain" behind the alleged Communist push to take over Hollywood, of inventing a miracle ray, of being behind the Lindbergh kidnapping and of devising a robot able to read human minds and exercise thought control.

Most of the information in the file is far more mundane. There are clippings and summaries of newspaper and magazine articles, many of them on Einstein's leftist politics. There are tedious enumerations of all the organizations to which the physicist belonged or lent his name that had been labeled subversive or Communist. Frequently repetitious, the reports in the file are never explicitly judgmental. Nonetheless, the principals of selection the Bureau employed reveal at least a suspicion that Einstein's outspokenness about world peace, civil liberties, disarmament and racial equality was evidence of his Communist ties. Some of the reports are concerned with the Bureau's suspicions that he had been involved, at least indirectly, in Soviet espionage activity, and perhaps still was at the time of the investigation.

Although the F.B.I. had collected information on Einstein since 1932, it did not begin its official investigation of him until the 1950s. An internal memorandum dated February 15, 1950, from D.M. Ladd, an F.B.I. agent, to F.B.I. Director J. Edgar Hoover summarized all the information on Einstein collected by the Bureau to date. That Hoover requested such a summary suggests a concern about Einstein's activities at the highest level. It is difficult to ascertain why Hoover did so, however, since thirteen pages in this part of the file were deleted by the Bureau under provisions of the Freedom of Information Act that allow government agencies to withhold the identities of informants and living people, and information whose release could be detrimental to national security. Whatever interested Hoover in Einstein initially, the focus of the investigation quickly turned to espionage. Below a section titled "Contacts and Associates" in the February 15 summary (deleted by the F.B.I. on the above grounds), there is an uncensored handwritten note initialed by Hoover that reads: "We should develop this. I have seen somewhere Einstein was the one who suggested Fuchs [*sic*] assignment to live in England. What about this?" In another note on the same page, Hoover wrote: "Also I recently saw a statement to the effect that a member of his family was in Russia. I think it was his son."

On March 10, 1950, Ladd sent another memorandum to Hoover. In it he put to rest the belief that Albert Einstein Jr. was in the Soviet Union (not permanently, however, since allusions to the son behind the Iron Curtain persist in subsequent reports). Ladd also promised to "develop" information linking the British atomic spy Emil Klaus Fuchs to Einstein, though he said that Einstein did not request Fuchs's assignment to England. The memorandum reports that Fuchs "was a brilliant scientist who had left his native Germany and had become a British subject; that Einstein had sent for him to help work on the atom bomb and that he had then recently returned to England." Ladd cited a newspaper interview with Fuchs's father, who claimed his son had been released from a Canadian internment camp for aliens after Einstein, unaware that he was a Communist, intervened on his behalf. According to the father, Einstein had been impressed by Fuchs's paper on nuclear energy and had considered him valuable to the Allied war effort.

With these tentative links between Einstein and Fuchs established, the Bureau took quite seriously subsequent charges that Einstein might be, or might have been, a spy. In early 1950, a German woman named Emma Rabbeis sent a letter to the State Department in which she claimed to be "in a position to make very positive statements to you concerning [Einstein's] political activity during the years of his residence in Berlin. I can also give you most exact information about the particulars of a woman with whom Einstein collaborated internationally." The letter was forwarded to Hoover's office, which in turn forwarded it and an English translation to the director of Army Intelligence on April 5, requesting that he investigate the matter. (The F.B.I. presumably ceded jurisdiction to the Army because Rabbeis lived in Berlin.) A counterintelligence agent interviewed her on June 22, and on July 31 Hoover received a summary of his findings. The report dismissed Rabbeis's accusations as hearsay.

She said that in the 1930s she had operated a Berlin dress shop that was frequented by a Baroness von Schneiderglend, whose entire family were communists. According to Rabbeis, Einstein and the Baroness's daughter had been fellow passengers on a voyage to America in the 1930s, and both had created a stir when they refused to stand during the playing of the German national anthem. That incident was Rabbeis's "proof" that Einstein was a communist. Rabbeis

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added that she believed Einstein was the father of von Schneider-glend's illegitimate child. Further questioning by the agent elicited a possible motive for Rabbeis's charges: she had devised a mathematical formula for winning the Berlin lottery and had sent it to Einstein for his comments. He had not replied.

Although Rabbeis's accusations were readily dismissed, the cover letter to the report notes, "However, information which emanated from former well placed K.P.D. members regarding Einstein's past activities is presently being checked and the European Command will forward a detailed report." This is the first reference to an espionage investigation based on the theory that from 1929 to 1931 Einstein's Berlin office was used as a "drop" for telegraph messages from Soviet agents in the Far East, a theory which the F.B.I. and Army Intelligence not only took seriously but later represented as fact. The suspicion triggered a four-year investigation by the F.B.I. and Army Intelligence, which was dropped shortly before Einstein's death for lack of corroborating evidence.

The spy charges against Einstein were brought by an informant whom Army Intelligence described as "usually reliable—possibly true." (As late as 1955, though, his identity was apparently unknown to the F.B.I., since an internal memorandum from that year identifies him as "an unnamed source.") The charges are summarized in an Army Intelligence report dated January 25, 1951, which was sent to the F.B.I. The informant alleged that Soviet agents sent coded telegrams to Einstein's Berlin office, where they were not noticed because of the large amount of international correspondence he received. He claimed they were intercepted by Einstein's chief secretary, a Communist agent, who passed them to Soviet couriers, who took them to Moscow. The source said that Einstein might have been unaware of this activity, since his secretary forwarded the telegrams before he could have seen them, but he believed Einstein might have known about it. Once, when his secretary was on vacation for several weeks, Einstein was allegedly handed the messages along with the rest of his mail. The source pointed out that a person who discovers his office is being used for unofficial purposes would most likely question his staff. Einstein did not do so, and the use of his address by Soviet spies continued, the informant claimed.

He also claimed that Einstein's entire Berlin staff of typists and secretaries had been recommended to him by the Klub der Geistesarbeiter (K.d.G.), the Club of Scientists, which was a Communist front, and he alleged that Klaus Fuchs had been a member. The informant believed that Einstein's chief secretary, whose name he could not recall, had a close, "probably intimate" relationship with a member of the Communist International Apparate" [*sic*], and that this affair, along with her communist sympathies, had drawn her into the conspiracy. According to the January 25 Army Intelligence report, "the information given by the source, as far as it goes, is probably accurate. On all points every effort was made to avoid generalities, which have been used only where detailed knowledge was not available." The source also provided the names of K.d.G. members and descriptions of their contacts, and claimed that several had been liquidated by the Russians in the purges of the mid-1930s.

The wealth of detail the informant supplied lent credence to his testimony, so much so that a subsequent F.B.I. report that was transmitted to the Immigration and Naturalization Service stated flatly, in a section titled "Synopsis of Facts": "Einstein's office in Germany was used as a telegram address by Soviet Apparate [*sic*] in the early 1930s." That allegation led to a series of F.B.I. investigations intended to identify Einstein's chief secretary as well as to locate people whom the source had named or who had known the scientist or lived near him at the time. Those were difficult tasks, since the investigators did not want to question Einstein or his current secretary and housekeeper, Helen Dukas, directly. Also, most of the people the F.B.I. sought had been killed in World War II or were missing or living in the Soviet sector of Berlin.

The Bureau's suspicions eventually turned to Helen Dukas, who had emigrated to the United States with Einstein. The F.B.I. suspected, but was never able to establish, that she had been Einstein's chief secretary from 1929 to 1931. She is depicted in several reports as being sympathetic to communism and as having communist acquaintances, but no specific allegations against her were ever made. On October 9, 1954, more than three years after the charge that Einstein's office had been used as a drop by Soviet agents was first made, the Newark office of the F.B.I., which was stymied in its investigation, recommended to Hoover that Dukas be interviewed directly. Hoover authorized the interview in a letter dated January 30, 1955, ordering that it "be conducted by experienced agents who must thoroughly familiarize themselves with all details and personalities mentioned in the Dukas and Einstein cases." The F.B.I. chief also suggested that the interviewers approach Dukas on the pretext that they were seeking information about individuals who had lived in Germany, not investigating her.

The interview took place three weeks later, in accordance with Hoover's suggestions. Dukas is described as being "extremely friendly and appear[ing] quite sincere in her answers. She did not appear to be evasive in any manner, but spoke quite freely. . . . At no time did she give any hint or indication that she was aware the investigation concerned her in any way." Dukas recognized only one of the names the Army Intelligence source had provided. She said she had never heard of the K.d.G., and described herself as apolitical and concerned only with Einstein's well-being. Most significant, she stated that Einstein worked at home and had no office in Berlin, and that she was his only secretary during the period in question, though his wife sometimes helped her with his correspondence.

In a cover letter accompanying his account of the meeting, the agent who interviewed Dukas observed that her recollection "in itself tends to discredit the allegations by G-2's [Army Intelligence] source, who furnished the information that Einstein's office had a staff of secretaries and typists." The agent addressed a recurring concern of the

Bureau in his report: "It is also to be noted that the interview has identified Einstein's children and their current whereabouts, discounting any possibility of children being held behind the Iron Curtain as possible hostages of the Soviets." He concluded:

> It is believed that additional investigation is not warranted in view of the long lapse of time since Einstein's office was allegedly used by the Soviets, the lack of corroborating information, and the fact that personnel involved are scattered in many countries and in many cases are deceased. Therefore, both the Dukas case and the Einstein case are being closed in the Newark Office, and will not be reopened on the basis of this allegation, unless advised to the contrary by the Bureau.

An April 26, 1955, memorandum from the Los Angeles office to Hoover concludes this part of the investigation: "In view of the announced death of Albert Einstein on 4/18/55, this office contemplates no further investigation without the specific request of the Bureau or Newark office."

Around the time the story of the Berlin message drop first reached Hoover's desk, the Bureau received other information about Einstein's purported Communist connections. On February 23, 1950, the radio commentator Walter Winchell forwarded a letter from one of his listeners containing a list of seventeen "commie fronts" to which Einstein allegedly belonged in 1947. In July, Winchell sent the F.B.I. another letter concerning Einstein's Communist affiliations.

Of greater urgency was the Immigration and Naturalization Service's request for a "report as to the nature of any information contained in any file—other than fingerprint records—which your Bureau may have concerning the following person." The form letter, dated March 8, 1950, and signed by District Director Karl I. Zimmerman, identifies Einstein as the subject of an I.N.S. investigation. On June 9, the F.B.I. asked the I.N.S. to "clarify the purpose" of the investigation of Einstein, "inasmuch as he is a citizen." On September 14, W.F. Kelly, Assistant Commissioner of the I.N.S., replied that "information available indicates that this naturalized person, notwithstanding his world-wide reputation as a scientist, may be properly investigated for possible revocation of naturalization." Included with Kelly's letter were two internal I.N.S. memorandums written by Zimmerman and dated June 14, 1950, and July 12, 1950. The first states that the I.N.S.'s interest in Einstein was triggered by an article in the Brooklyn newspaper *The Tablet*, which "would seem to indicate that an investigation should be conducted to determine whether there were activities on the part of the subject . . . which might justify the filing of a suit to cancel citizenship." Zimmerman summarizes the article, an exposé of Einstein's ties to groups listed by the House Committee on Un-American Activities as Communist or Communist fronts, and he dwells on Einstein's support of groups that opposed the fascists during the Spanish Civil War. The "evidence" against Einstein included the fact that he "was a sponsor of the Spanish Refugee Relief Campaign . . . and a pamphlet entitled 'Children in Concentration Camps.'" (H.U.A.C. classified the Spanish Refugee Relief Campaign as a Communist front in 1940.) The July 12 I.N.S. memorandum merely supplies the additional information that in 1932 Einstein participated in the First World Congress against War and Fascism.

On November 28, the F.B.I. responded to Kelly's letter with a report headed "RE: Albert Einstein," which informs the I.N.S. that "a check of the general indices of this Bureau failed to disclose that any investigation has been conducted by the F.B.I. pertinent to your inquiry." The report provides a five-page summary of Einstein's life, emphasizing his pro-communist political views, and concludes with a two-page list of organizations with which he was affiliated that were on the usual lists.

Although the Philadelphia office of the I.N.S. formally requested F.B.I. clearance to investigate Einstein and Helen Dukas in August 1950, it was never granted because the F.B.I. did not receive the letter—at least it had no record of it. The exchange of memorandums between the two agencies continued, culminating in a letter from Hoover to the commissioner of the I.N.S. dated February 12, 1952, in which Hoover assures the I.N.S. chief that "the Federal Bureau of Investigation does not interpose any objection to any investigation that the Immigration and Naturalization Service may desire to conduct concerning Albert Einstein and Helen Dukas, nor has the Federal Bureau of Investigation ever interposed any such objection." On February 23, the F.B.I. sent the I.N.S. a thirteen-page summary, which, among other things, represented as fact the allegation that Einstein's Berlin office had been used as a Soviet message drop. There is no information in the F.B.I. files on whether the I.N.S. took further steps in its Einstein investigation.

The exchange of information between the F.B.I. and the I.N.S. drew Hoover's attention to the fact that although the Bureau had collected more than a hundred pages of documents, it had not prepared an investigative report on Einstein. On January 10, 1952, Hoover sent a memorandum to the Newark office discussing the I.N.S. requests, which concluded:

> Bufiles [Bureau files] reflect that there has never been an investigative report prepared in the Albert Einstein case. Newark is therefore directed to prepare an investigative report, suitable for dissemination, containing all the pertinent data received to date on Albert Einstein.

Hoover's memorandum led to a more comprehensive effort, called a correlation summary, which was begun on February 25, 1952. When the summary was completed a year later, it filled 1,160 pages.

Purporting to be "a summary of information obtained from a review of all references to the subject contained in Bureau files except main file references," the mammoth report is a potpourri of facts and wild allegations. It contains, for example, a translation of Einstein's introduction to the German edition of Upton Sinclair's book on mental telepathy, *Mental Radio*. The subject of telepathy recurs eighteen pages later, in an interview with an informant who claimed to know someone who had been a victim of a mind-control robot that Einstein had allegedly invented. The in-

terviewer later learned that either the source or her acquaintance had spent two years in an insane asylum.

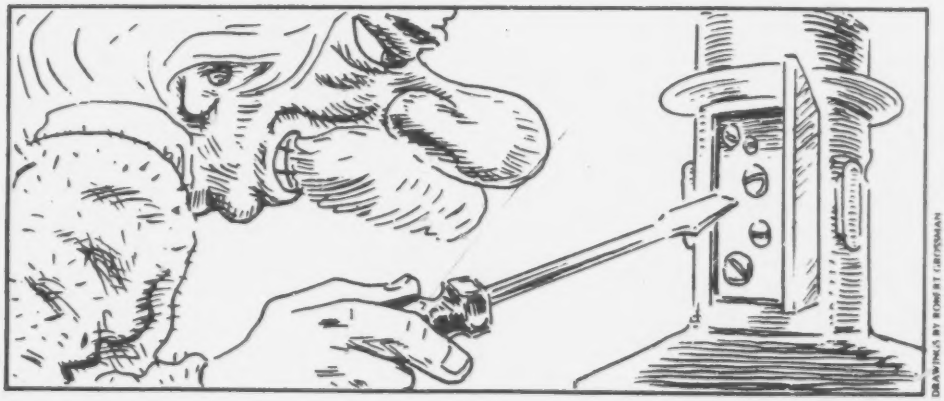
The report also contains a letter from a Beaver Falls, Pennsylvania, patriot, who told the F.B.I. that at the November 1, 1938, meeting of a group called the Music Boys in New York City, a speaker had claimed that Einstein "is experimenting with a ray which will help us to destroy armed opposition—aircraft, tanks, and armored cars. He hopes that with it a dozen men could defeat 500. Through it 500 could rule a nation." Another reference to the ray appears in the Bureau's summary of a May 21, 1948, article in the *Arlington Daily*, which stated that Einstein and "ten former Nazi research brain-trusters" had met secretly and watched a beam of light melt a block of steel. According to the article, this new weapon could destroy entire cities. Following the summary is a paragraph stating that Army Intelligence had been told by its research and development group that the article had no basis in fact. A September 28, 1951, entry states that a caller told the Bureau that Einstein had framed Bruno Hauptmann, who had been convicted and executed for the Lindbergh kidnapping.

Someone who claimed to have been a story and advertising executive with D.W. Griffith Pictures from 1919 until the early 1930s, and executive head of the story department at RKO in the early 1930s, made an allegation the Bureau took more seriously. In a letter dated April 21, 1953, the informant described meeting an acquaintance at a fashionable portrait studio in the lobby of the Ambassador Hotel in Los Angeles. When asked how he could afford to pay the Ambassador's rent, the acquaintance replied that the studio was a Communist front. He tried for three hours to persuade the informant to cooperate with the Communist Party. Failing to do so, the acquaintance took him upstairs to Einstein's suite, explaining, "He's the one that never fails with the big shots." Einstein himself answered the door but said he was busy. Could the informant come back tomorrow? The informant did not return, however, and ignored subsequent warnings that "if I wanted to get ahead in Hollywood I had better play ball with him, that through Einstein they were getting control of every studio, and that if I didn't be sensible I might be through in Hollywood." The man claimed that within weeks he had lost his job and had four contracts canceled. He said that since then he had been unable to hold a job with a Hollywood studio for more than a few weeks before being fired.

This tale spawned an extensive investigation and a twenty-page report, which cited a reliable source who insisted that Einstein had never rented a suite at the Ambassador Hotel.

In an interesting twist, in 1940, Einstein, upon being interviewed by F.B.I. investigators, told them of his concern about the loyalty of another scientist, the Nobel Prize-winning chemist Peter Debye. A Dutchman named Feadler (the Bureau's phonetic spelling) sent Einstein a letter in the spring of 1940, accusing Debye, a former head of the Kaiser Wilhelm Institute in Germany who was then lecturing at Cornell University, of possibly being a German spy. British agents intercepted the letter and brought it to Einstein. Einstein notified Princeton University Prof. Elia Lowe, who accompanied the agents to Cornell to discuss the matter with university authorities. Despite Lowe's advice to the contrary, the Cornell authorities told Debye of the charge against him. Debye subsequently wrote Einstein insisting that he was not involved in espionage. When the F.B.I. learned separately of the allegation, they questioned Einstein. While he was careful not to make any statements he could not substantiate and to point out possible benign interpretations of the charge against Debye, he expressed strong doubts about Debye's character and loyalty. Einstein told the F.B.I. that Debye should not be trusted with military secrets unless it was certain he had severed all connections with the German government, and he "made it clear that Debye should be watched for awhile to ascertain his motives."

One of the last documents in the F.B.I. file, a memorandum from W.A. Branigan, an F.B.I. official, to A.H. Belmont, an-



DRAWING BY ROBERT GRYCHMAN

other official, dated July 27, 1955, can serve as a summary of the case against Albert Einstein. The memorandum states:

> Investigation of Einstein instituted 1950 based upon information that he was affiliated with over 30 Communist-front organizations. Investigation reflected he sponsored entry into U.S. of numerous individuals with pro-Communist backgrounds. . . . Extensive investigation in U.S. showed Einstein affiliated or his name extensively associated with literally hundreds of pro-Communist groups. No evidence of C.P. membership developed.

The memorandum also discusses the Berlin message drop investigation, but it is difficult to say which was of greater concern to the Bureau, Einstein's alleged involvement in espionage or his open avowal of pacifism, civil rights and racial equality. His support of the Hollywood Ten and his advocacy of the abolition of the Thomas Committee on Un-American Activities are noted in his file. His support of populist Presidential candidate Henry Wallace is noted. His sponsorship of a testimonial dinner for W.E.B. DuBois is noted. His support of Willie McGee, a black man Einstein believed to have been framed on a rape charge, is noted, as is his support of the Scottsboro Eight. His friendships with leftists like Charlie Chaplin, Paul Robeson and Frank Lloyd Wright are noted. His articles in *The Bulletin of the Atomic Scientists* advocating world government and a more humanistic, less militaristic approach to foreign policy are summarized. Included too are articles that question the veracity or importance of Einstein's scientific contributions, that relegate him to a mere copier of his scientific predecessors and that attack his religious views. Statements made by Einstein criticizing fascism that coincide with the views of the Communist Party appear in the file.

THE ISSUES ARE JOINED

Future Controversies in "The Nation"

World Government: An Idea Whose Time Has Returned? By Sidney Lens

Comments: Richard Falk, Kirkpatrick Sale, Paul M. Sweezy

Libel and the Press: Why Not a Right of Reply? By Aryeh Neier

Comment: Martin Garbus

F.O.I.A. Exemptions: Are the C.I.A. and the A.C.L.U. Strange Bedfellows? By Angus Mackenzie

Comment: Morton H. Halperin & Allan Adler

More Comments on *Beyond the Waste Land*

And Also—

Stephen Gillers: The Warren Court Never Died

Jamie Kalven: *Justice* Bork? (What He Thinks About the First Amendment)

Earl Shorris: While Someone Else is Eating (IV)

To the historian of science, the F.B.I. file on Einstein is significant for several reasons. First, it demonstrates the extent to which the government kept an eye on the most famous atomic scientist of the period. Moreover, it underscores the suspicion with which the government regarded his efforts to have the fruits of his research applied in a responsible, moral fashion. It also reveals something of Einstein the public figure, who inspired a mixture of awe and fear among ordinary people. The unsolicited letters accusing him not only of being a communist sympathizer but also of being a courier, a mastermind and a spy are most revelatory of that ambivalence.

What is so disturbing about the file is that it shows that, in spite of the apparent professionalism with which most of the investigations were conducted, there seems to have been a willingness, almost a desire, to presume that Einstein was guilty of *something*. That comes across in Hoover's obvious desire to find a connection between Einstein and Klaus Fuchs, in the Bureau's ready acceptance of the Army Intelligence source's claim that Einstein's office had been a message drop for Soviet agents, in its decision to invest so much time investigating the preposterous allegation that Einstein was the "brain" behind the alleged Communist push to take over Hollywood in the 1930s, and in the alacrity with which the Newark office reopened its investigation of Einstein after learning he had sent a confidential letter to Judge Irving R. Kaufman, the presiding judge in the Rosenberg espionage trial, on behalf of the defendants. The I.N.S.'s willingness to launch an investigation of Einstein on the strength of a single article in a right-wing newspaper is part of the same pattern.

From the standpoint of the taxpayer, the waste of public funds chronicled in these reports is appalling. The amount of money spent to pay the people who devoted countless hours to clipping newspaper items, typing summaries of public statements and following up absurd leads must have been enormous. Even granting that plausible suspicions of espionage should be pursued, only a relative handful of pages in the file deal with legitimate national security matters. The bulk of the material concerns Einstein's exercise of his rights of free speech and political expression, which should have little place in an espionage investigation. If he had been on the far-right end of the ideological spectrum rather than on the left, it is doubtful that the file on his political views would be nearly as extensive.

Perhaps most perplexing is the way in which history is ignored. The Depression, the rise of Nazism and World War II might never have happened as far as the F.B.I. was concerned. That someone might have supported communist causes during the 1930s in response to an economic crisis that represented at least a temporary failure of capitalism or to the spread of fascism is not even considered. The F.B.I. appears to have thought that a Communist or suspected Communist from the past is necessarily a Communist in the present, and just as necessarily a threat to the American system. More than anything else, the 1,500 pages of the F.B.I. file reveal how powerful and widespread that belief was. In the end, the file is not only a lode of information

and innuendo about Albert Einstein; it is also a record of the F.B.I.'s mentality during the early 1950s. □

I wish to acknowledge the financial and intellectual support of the National Endowment for the Humanities. This project was conceived in a 1980 N.E.H. seminar conducted by Stephen Brush at the University of Maryland and completed in 1983 in a seminar conducted by Eugene Rochlin and Paul Thomas at the University of California at Berkeley. I wish also to thank Manfred Ensle of Colorado State University, who originated the idea of requesting the F.B.I. file on Einstein. The file was obtained under the provisions of the Freedom of Information Act, and the duplicating fees were paid by an award from the College of Arts and Sciences at Florida International University.

LETTER FROM EUROPE

How Many Masses Is Poland Worth?

DANIEL SINGER

"Oh God," Heinrich Heine wrote, "how big is your zoo!" This sentence kept popping into my head in June as I read the dispatches of my journalistic colleagues on Pope John Paul II's journey through Poland, apparently written on bended knees after having visions of the Black Virgin of Czestochowa. So strong was the spell they were under that they did not even raise an eyebrow when the Pope proclaimed that the right to form trade unions could not be granted by a government because it was "innate," inborn. It was not won by political struggle, he said, it was a gift from God. But if the right is innate, I wondered, why didn't the Catholic Church recognize it until well into the twentieth century, and then only in some countries? One felt meanspirited quibbling over such matters while the Pope was being hailed not only by reporters but by millions of people in Warsaw and Wroclaw, in Krakow and Katowice, as the spiritual leader of Poland, the scourge of the military dictatorship and the main supporter of Solidarity.

After the extraordinary show was over and the enthusiastic crowds had gone home, *Osservatore Romano*, the official Vatican newspaper, in a too-candid editorial, revealed what the Pope's game really was. He had not gone to Poland to curse General Jaruzelski but to strike, or ratify, a complicated deal that would prop up the regime.

To say such a thing may get me in trouble. Not so long ago several allegedly left-wing readers practically accused me of being an agent of the Vatican because I insisted Solidarity was primarily a proletarian movement, despite the size of the cross Lech Walesa wears. Tomorrow the same people will warn people of the left not to be "more Catholic than the Pope," and to treat Jaruzelski at least as a partner, even if we don't bless him. Yet why should left-wingers follow in the footsteps of John Paul II? What sort of unholy bargain with Caesar did Cardinal Glemp work out, subject to papal endorsement? And if the Pope and the general did conclude an agreement, will they be able to implement it at the expense of Solidarity and over the heads of the Polish workers? To answer those questions we must understand the historical role of the Catholic Church in Poland.

Before World War II, the Polish church was one of the most reactionary in the world. It pandered to the rich, preached submission to the poor and appealed to widely held prejudices such as anti-Semitism. Paradoxically, the Catholic Church was weaker then than it is today, despite the close links it had with the state. (For example, couples who wanted to be married in a civil ceremony could do so only in the Free city of Danzig—Gdansk.) More than one-third of Poland's 35 million people belonged to ethnic or religious minorities: they were mainly Jews, Protestant Germans, Orthodox Byelorussians and Ukrainians. Arrayed in opposition to the reactionary church were the forces of the left—the Communists, the Socialists and a not negligible anticlerical intelligentsia. The power of the church was also potentially threatened by the very fact that it rested on the prejudices it fostered among a predominantly backward peasant population. (It was commonly believed in the countryside that Christ was Polish, because one was either a "true Pole" or a Jew, and God, it goes without saying, could not be Jewish.)

After the war, the situation changed dramatically. The ethnic and religious minorities had vanished: the Jews had been tragically exterminated, the Ukrainians and Byelorussians had been absorbed by the Soviet Union, and the Germans had been expelled. The new regime's early progressive measures, such as land reform and the elimination of capitalist property, thrust virtue upon the church by depriving it of some embarrassing backers. Instead of defending the interests of wealthy landlords, the church was relegated to representing peasant smallholders. The Stalinist postwar regime also helped the church by confusing ideological struggle for the minds of the people with coercion and repression of religion, including a ban on building new churches. Once pampered and now persecuted by the state, the church acquired a martyr's halo. The regime's mistakes and injustices in other areas helped the church regain its ancient role as a rallying point for resistance to an alien power.

Wladyslaw Gomulka, who returned to power in 1956, realized that the government had not used the most popular or the most efficient methods of handling the religious question. His policies transformed the relationship between the Communist Party and the church into a complex struggle for ideological supremacy, a contest which did not exclude concessions and compromises by both sides. In this battle of wits, the clergy, guided for years by the stubborn and wily Cardinal Wyszynski, scored points time and again, helped by blunders perpetrated by the state. In 1968, for instance, it was the world upside down: the Catholic university in Lublin offered teaching positions to academics who had been fired by a "communist" government because they were Jewish.

Daniel Singer is The Nation*'s European correspondent. He is the author of* The Road to Gdansk *(Monthly Review Press).*

Monday, December 12, 1977 THE WASHINGTON POST

Secret Hoover Files Show Misuse of FBI

By Joanne Omang
Washington Post Staff Writer

President Franklin D. Roosevelt dismembered the Army's spy-catching Counter-Intelligence Corps in 1943 after it allegedly spied on Eleanor Roosevelt's sex life, according to third-hand reports in former FBI director J. Edgar Hoover's "official and confidential" files outlined in the current issue of U.S. News and World Report. (ATTACHED)

In its Dec. 19 issue, out today, the news magazine describes the contents of 7,000 documents from Hoover's secret files made public recently under a Freedom of Information Act request by historian Athan Theoharis of Marquette University in Milwaukee.

In a telephone interview with The Washington Post, Theoharis called the papers "a very valuable collection . . . part of Hoover's 'dirt file,' " but noted that another 10,000 pages were withheld for national security, personal privacy or other reasons allowed by law.

The documents, although heavily censored, show a pattern of heavy use by presidents from FDR to Richard M. Nixon of the FBI's considerable powers to investigate political enemies, intimidate critics and engage in wiretapping and electronic eavesdropping for concerns having nothing to do with national security, according to Theoharis.

They document the development of FBI policy on the use of microelectronic equipment and the twists and turns of congressional oversight efforts. "Some documents suggest the bureau was operating on its own in installing wiretaps," Theoharis said.

The documents also substantiate widely published allegations from former FBI officials that Hoover kept virtually every scrap of information that came into his hands from any source, with or without corroboration, and "drew on the wealth of defamatory information at his fingertips to curry favor with presidents and other officials," the article says.

FBI officials, confirming the papers' release, said they would not comment on the magazine article or the context of the documents, which are expected to be made available to the public at the FBI library.

An FBI agent named G.C. Burton wrote a memo Dec. 31, 1943, included among the documents, that purported to explain why FDR had all but closed down the Counter-Intelligence Corps earlier that year. Burton said two colonels had told him the CIC infuriated Roosevelt by bringing him tapes allegedly of Eleanor Roosevelt having sex in a hotel room with then-Army Air Corps Sgt. Joseph P. Lash, 33 at the time, who was under surveillance for suspected involvement with leftist groups.

Lash, author of the 1982 book "Love, Eleanor," has vehemently denied having an affair with Eleanor Roosevelt, who was 26 years older than he.

"Mrs. Roosevelt was called into the conference and was confronted with the information, and this resulted in a terrific fight between the president and Mrs. Roosevelt," Burton's memo said the colonels had told him.

A few weeks later, Lash and 10 other airmen were abruptly transferred from Michigan to the South Pacific and the CIC headquarters at Fort Holabird, Md., was closed. By the end of the year, hundreds of CIC agents had been reassigned.

But other memos in the file suggest that Burton's sources may have mixed up a CIC report of an uneventful, strictly platonic March meeting between Eleanor Roosevelt and Lash at a hotel with another CIC report of a very un-platonic night Lash spent a week later in the same hotel with the woman he later married, Trude Pratt. "A later FBI memo clearly confuses the two," the U.S. News article said.

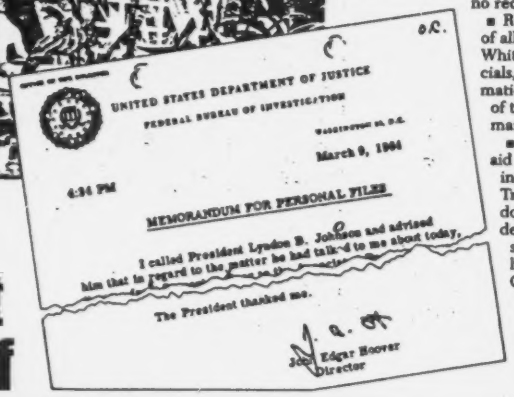
The papers show that President Lyndon B. Johnson's office ordered that no records of his requests be kept, an order Hoover ignored. Johnson demanded and got "blind memos" on paper without letterheads, signatures or watermarks.

At his order, the FBI talked to "at least five officials of the [Washington] Evening Star, including the editor, Newbold Noyes," in June, 1965, about Johnson's irritation at unfavorable Star articles, the documents show.

Agents also questioned reporters about Chicago Daily News reporter Peter Lisagor in 1966 when Johnson was irritated with him. In 1962, when Johnson was vice president, agents had interviewed the editor of Farm and Ranch magazine over a critical editorial he had written about Johnson.

The documents include voluminous files on President John F. Kennedy's alleged playboy activities, and quite a lot on Adlai E. Stevenson the Democratic presidential candidate in 1952 and 1956, frequently misspelling his name. There are also dossiers on Roosevelt holdovers in President Harry S Truman's administration, compiled at Truman's request, and on three employes of Dwight D. Eisenhower's White House who resigned after charges of homosexual activity.

But virtually none of the files include data on Eisenhower himself and the FBI withheld a 5,000-page file on Truman's White House, Theoharis said. "We just have the cover letters on reports that are deleted," he said.


UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
March 9, 1964
4:34 PM
MEMORANDUM FOR PERSONAL FILES
I called President Lyndon B. Johnson and advised
him that in regard to the matter he had talked to me about today,
The President thanked me.
Edgar Hoover
Director

The Secret Files of J. Edgar Hoover

For five decades, the FBI's famed chief amassed highly personal information on key politicians. These documents, now being released, tell some startling stories.

The government is lifting the lid of secrecy from the confidential files of J. Edgar Hoover—records once so sensitive that the FBI treated them, in one official's words, "like three cabinets full of cancer."

Dealing with Presidents, lawmakers and other political bigwigs, the material ranges from reports of their sexual hanky-panky to accounts of behind-the-scenes infighting—all gathered by agents and sequestered by Hoover in his own office during the nearly half a century in which he headed the Federal Bureau of Investigation.

Even top bureau officials were barred from looking at these "official and confidential" files without their chief's permission.

Now, more than 7,000 pages of the documents have been released under the Freedom of Information Act to scholars and others. Many of the allegations are hearsay; many are unproven. Still, though heavily censored, the files are a treasure-trove for historians, providing insights into the operations of one of the country's most powerful agencies from Hoover's appointment in 1924 until his death in 1972.

Among records examined by *U.S.News & World Report*:

- Memos summarizing alleged sexual adventures of John Kennedy as a naval officer, senator and President, and describing how Hoover handled these reports.
- A thirdhand account of a White House meeting that was described as a stormy session in which Army Counterintelligence Corps (CIC) officials played for Franklin Roosevelt a recording of a supposed sexual liaison between his wife Eleanor and a young CI in a hotel. The sexual-misconduct charge is vehemently denied and remains unproven. The surveillance of Mrs. Roosevelt, however, figured in the near dismantling of the CIC during World War II.
- Memos detailing how Lyndon Johnson sent the bureau on political errands and then demanded that no record be kept of his requests.
- Reports on FBI investigations of alleged homosexual activity by White House and subcabinet officials, including long-buried information on the forced resignation of the State Department's No. 2 man during World War II.
- Accounts of Hoover's secret aid to Thomas Dewey in his losing GOP drive against Harry Truman in 1948, plus critical dossiers on Democratic presidential nominees Adlai Stevenson, beaten by Dwight Eisenhower in 1952 and 1956, and George McGovern, who lost to Richard Nixon in 1972.
- Documents describing politically inspired wiretapping conducted by the FBI at the behest of the Truman White House.

After Hoover died, his loyal aides were so nervous about what his files contained that they denied the documents' very existence at first. When newly appointed FBI officials looked into these files in 1975, they were called to account by members of Congress worried that the bureau held dossiers stuffed with the most intimate secrets of their lives. The FBI men explained that the bureau routinely kept information that came into its hands, no matter how personal, farfetched or unsubstantiated, because it might someday help solve a serious crime such as blackmail of a senator or the assassination of a President.

The records examined by the magazine's staff members show that the bureau's instinct for self-protection often dictated its actions. The files also corroborate reports from some of Hoover's ex-aides that he drew on the wealth of defamatory information at his fingertips to curry favor with Presidents and other officials and used the bureau's resources to intimidate persons who criticized him or the FBI.

Even so, the documents available—less than half of Hoover's private files—leave questions unanswered. There are voluminous files on Kennedy but little on Nixon and Eisenhower. Why? Was Johnson alone in demanding that the bureau keep no record of his irregular requests, or did other Chief Executives make similar demands?

The Dossier on JFK

In the 20 years since John F. Kennedy's death, reports of sexual exploits by the late President have been widely published. While Kennedy was living, however, such stories circulated only among a few Washington insiders. All went into Hoover's files, with little attempt to check accuracy.

In July, 1960, when the Massachusetts senator was on the verge of becoming the Democratic nominee for President,

FBI analysts pulled together a nine-page report on him for their chief. One section said:

"As you are aware, allegations of immoral activities on Senator Kennedy's part have been reported to the FBI over the years.... They include data reflecting that Kennedy carried on an illicit relationship with another man's wife during World War II; that (probably in January, 1960) Kennedy was 'compromised' with a woman in Las Vegas; and that Kennedy" and a world-famous male entertainer had "in the recent past been involved in parties in Palm Springs, Las Vegas and New York City."

The memo further related that JFK and the entertainer were "said" to be the subjects of "affidavits from two mulatto prostitutes in New York" in the possession of *Confidential* magazine, a scandal sheet that flourished from 1955 to 1958 before collapsing under an avalanche of libel suits.

Pet speech. Available files do not indicate whether Hoover conveyed word to Kennedy about these allegations or whether the President-elect was aware of them when he announced on Nov. 10, 1960, two days after his election, that he was asking Hoover to stay on as FBI director. The record does show that when Hoover picked up a report of sexual misconduct by an important politician, he often found occasion to pass the word on. "I know there's no truth to this. I'll never speak of it to anyone," Hoover would promise. "It was one of his favorite speeches, one he gave often to politicians," recalled the late William Sullivan, a longtime aide who had a bitter falling-out with him in 1971.

Hoover with John and Robert Kennedy. The FBI kept collecting allegations of womanizing by JFK even after he was President.

An August, 1962, memo indicates that the bureau informed Robert Kennedy, who as Attorney General was Hoover's boss, when it received allegations that he "was having an affair with a girl in El Paso." The Attorney General was quoted as replying that he had "never been to El Paso."

The collection of data on John Kennedy did not cease when he became President. On March 20, 1962, bureau officials assembled from their files reports that Judith Campbell, a free-lance artist in Los Angeles, had made a series of telephone calls to President Kennedy's secretary, Evelyn Lincoln, at the White House. Campbell was being watched because of her friendship with two mobsters.

"The nature of the relationship between Campbell and Mrs. Lincoln is not known," a memo to Hoover said, but added: "[deleted] referred to Campbell as the girl who was 'shacking up with John Kennedy in the East.'"

"This is being submitted as the director may desire to bear this information in mind in connection with his forthcoming appointment with the President," a covering letter said.

Hoover and Kennedy lunched together on March 22, but there is no record of what was discussed. The last telephone call from Campbell to the White House was logged a few hours after that session. Still, the FBI kept her under close surveillance. An August, 1962, document told how an FBI agent saw a man enter Campbell's Los Angeles apartment from a balcony. Although the agent witnessed what may have been a burglary in progress, FBI officials decided not to inform the police "in view of the highly sensitive nature of our inquiries concerning Campbell."

Agents vied with each other in providing tidbits on political figures that ranged from corroborated intelligence to outright gossip. A 1940 memo told how Supreme Court Justice Felix Frankfurter was pulling strings with his "stooges in the administration" to influence the appointment of the Secretary of War. Decades were to pass before historians caught up with the bureau's inside knowledge of how politically active Frankfurter was while holding a position supposedly above politics.

Hoover often let his agents know that he appreciated the information. In a letter on June 10, 1958, he wrote: "I certainly appreciate your bringing to my attention personally the many interesting items." On Oct. 29, 1965, he thanked another agent for "advising me of the immoral activity existing in certain circles in Washington, D.C."

Hoover sometimes used these "interesting items" to ingratiate himself with the powers that be. Francis Biddle, Attorney General and Hoover's superior in the Roosevelt administration, recalled later how Hoover had titillated him with "intimate details" about his fellow cabinet members. Likewise, when Johnson was in the White House, Hoover sent him what officials have since described as transcripts of recordings made in civil-rights leader Martin Luther King's hotel rooms.

Many of the reports from agents that Hoover and his aides relied on for the inside gossip they relayed to political leaders ended with the line, "Unless otherwise indicated, the material set forth above has been obtained from confidential technical means." This was the bureau's euphemism for bugs or wiretaps.

The First Lady and the Sergeant

In 1943, at the height of World War II, FBI officials watched in amazement as the Army's spy-catching arm, the Counterintelligence Corps, was all but dismantled in just a few months. Its headquarters was closed down, agents were reassigned, files were burned. By early 1944, the CIC was hard put to fill an urgent request from General Eisenhower for agents to support the Normandy invasion.

What accounted for such seeming lunacy? Four decades would pass before the story became public. But top FBI leaders received an explanation in a memo dated Dec. 31, 1943, from agent G. C. Burton. Two disgruntled colonels had told him, he reported, that the torpedoing of Army counterintelligence stemmed from a colossal CIC misstep: Its agents had bugged what they portrayed as a liaison between Eleanor Roosevelt and Joseph P. Lash, then 33, an Army Air Forces sergeant under surveillance because of his association with leftist groups.

Burton reported that he was told FDR learned of the eavesdropping and summoned two top Army intelligence officers to the White House at 10 o'clock one night for a meeting that lasted until dawn. The embarrassed officers played a recording that "indicated quite clearly that Mrs. Roosevelt and Lash engaged in sexual intercourse during their stay in the hotel room," Burton's memo said.

"After this record was played, Mrs. Roosevelt was called into the conference and was confronted with the informa-

tion, and this resulted in a terrific fight between the President and Mrs. Roosevelt," the memo continued. "At approximately 5:00 a.m. the next morning the President called General Arnold, Chief of the Army Air Corps, and upon his arrival at the conference ordered him to have Lash outside the United States and on his way to a combat post within 10 hours.

"After the conference was over it was learned that the President had ordered that anybody who knew anything about this case should be immediately releaved [sic] of his duties and sent to the South Pacific for action against the Japs until they were killed," the memo said.

Mrs. Roosevelt poses with Trude Pratt and Joseph Lash at the White House 2½ years before Army spying episode.

Doubts and denials. So steamy a tale of sin and vengeance within the First Family must have astonished the FBI's top echelon. But how much truth was in the account?

Burton, who now lives in Sun City, Ariz., says he knows no more than what he was told. He neither heard the recording nor saw CIC reports on the surveillance of Lash.

Substantial reasons exist to doubt major aspects of the story. Lash, who now lives in New York, obtained under the Freedom of Information Act many of the FBI and CIC documents referring to him and published some of them last year in his book *Love, Eleanor.* A friend of both Eleanor and Franklin Roosevelt, Lash vehemently denies having had an affair with the First Lady, who was 26 years his senior. In a foreword to the book, Franklin Roosevelt, Jr., says of the White House meeting described by Burton: "I find the episode unbelievable. It would have been out of character for my father and mother to have acted the way they are reported to have acted."

An analysis of the records suggests that agent Burton or his sources, neither of whom was present at the White House meeting, may have gotten two CIC documents mixed up. A later FBI memo clearly confuses the two. One CIC report covers a meeting between Lash and Mrs. Roosevelt at the Urbana-Lincoln Hotel in Urbana, Ill., on March 5, 1943. It makes no mention of bugging the hotel room assigned to Lash or the adjoining room of Mrs. Roosevelt and her aide, Malvina Thompson, or of any sexual misconduct. The investigator sent to watch Lash remained in the lobby until 10:15 p.m. and then received instructions to "discontinue surveillance of the subject," the CIC report said.

One week later, Lash stayed at the same hotel with Trude Pratt, who later became his wife. This time the room was bugged. The lieutenant conducting the surveillance wrote that Lash and his friend "appeared to be greatly endeared to each other and engaged in sexual intercourse a number of times."

The youthful FBI director with FDR in the Oval Office.

Whatever happened at the Illinois hotel or in the White House meeting, a swift series of actions followed, suggesting high-level disapproval. Lash and 10 other airmen were abruptly pulled out of the classes they were attending at a weather-forecasting school in Grand Rapids, Mich., and shipped off to the South Pacific. Officers there were mystified when they arrived on their "secret" mission.

An inspector general's probe of Army counterintelligence got under way, and by the end of the year hundreds of CIC agents had been shifted to other assignments. The Countersubversive System, which had produced many leads on possibly disloyal soldiers, was abandoned. All countersubversive manuals, statistical reports and personnel records were ordered burned. The CIC headquarters at Fort Holabird, Md., was closed in February, 1944.

What was behind it all? As far as the public knew, the CIC was broken up because of a mess the inspector general uncovered. A different explanation is given in documents that were classified until recently. Col. H. R. Kibler, wartime head of the CIC, told an Army historian in 1953 that the move was ordered by Gen. George Marshall, Army chief of staff, because of an investigation conducted by agents in Washington and Chicago involving "something that would be personally embarrassing to the Roosevelt family."

FBI reports on the episode were tucked away in Hoover's closely held files but not forgotten. They were pulled out in 1951 when a senator asked if the FBI had ever investigated the ties between Lash and Mrs. Roosevelt. Hoover's aides concluded that, since the reports were not in the main files and only a few top bureau officials knew of them, it was "thoroughly safe" to tell the senator that "FBI files do not contain any such information."

Burton's explosive memo was recalled again in 1954 when an aide sent a copy to Hoover with a note saying: "The thought occurs that if the President [Eisenhower] does not know of the furor that was caused in G-2 [Army intelligence] some years ago as the result of G-2's investigation of [Lash and] his connections with Mrs. Roosevelt, you might want to consider mentioning this incident to him." Available documents do not reveal whether Hoover passed this juicy bit of hearsay along to Eisenhower.

Orders From Lyndon Johnson

Hoover's files suggest that President Johnson often demanded favors of the FBI and that Hoover usually granted them. Only when the bureau appeared in danger of being dragged into a damaging political donnybrook did he say no.

In 1966, for example, when rumors began circulating that Senator Thomas Dodd (D-Conn.) was involved in illegal activities, the Johnson White House ordered the FBI to check out the rumors "discreetly" but not to open an investigation or interview Dodd. Later, when it was learned that columnist Jack Anderson had obtained Dodd's office records, Johnson gave the green light for an FBI investigation. But the

White House cautioned the bureau that "no record should be made in FBI files regarding the fact that the White House had previously requested that no investigation should be conducted regarding Senator Dodd."

Hoover penned at the bottom of a memo from an aide: "We certainly got into a squeeze play through no fault of our own." Dodd was censured by the Senate in 1967 for irregularities in his financial affairs and was defeated for re-election in 1970. He died the following year.

Johnson was ever fearful that his contacts with the bureau would leak out. In 1966, his aides instructed the FBI to respond to White House queries on "matters of extreme secrecy" with "blind" memoranda—reports with no indication of the source, on paper without watermarks. In 1967, Johnson asked specifically that this protection be given to White House requests dealing with the case of Bobby Baker, the former secretary of the Senate and protégé of LBJ's who was later convicted of fraud. Johnson, in fact, wanted the FBI itself to keep no records of his demands and inquiries—an order Hoover ignored.

"Put a surveillance on him." Other records show how Johnson several times used the FBI to lean on journalists he considered unfriendly. In June, 1962, he called in a bureau official to report that he was "very angry" about a critical editorial in *Farm and Ranch* magazine. Hoover approved agents interviewing the editor and preparing a report for Johnson, who at that time was Vice President.

In June, 1965, Johnson, by then President, complained to Hoover about a number of adverse articles and cartoons in the *Washington Evening Star*. A Hoover aide reported to the director that he had "discussed this matter on a very discreet basis with at least five officials of the *Evening Star*, including the editor, Newbold Noyes," and received an accounting that showed the paper had published more favorable than unfavorable articles about the President.

Another journalist to stir Johnson's ire was the late Peter Lisagor of the *Chicago Daily News*. In February, 1966, a White House aide told Hoover "the President feels Lisagor is tearing him apart and getting information from some-place and thought we ought to put a surveillance on him to find out what he is doing and where he is getting his information." To satisfy the President, agents questioned other reporters about Lisagor and his sources.

Hoover gets a Lyndon Johnson-style handshake. LBJ called on the FBI to perform a variety of political errands.

The limit of the bureau's willingness to do the bidding of Johnson was reached in June, 1962. A Johnson aide asked that FBI agents be sent to interview Representative William Cramer (R-Fla.), who was publicly threatening impeachment proceedings against the Vice President for allegedly being involved with Billie Sol Estes, a Texas wheeler-dealer later imprisoned for fraud. The proposed interview may have been seen as a way of calling Cramer's bluff or scaring him off.

An FBI official told the Johnson man that Cramer would "holler like a stuck pig" if the bureau approached him on the basis of a request from LBJ. The next morning, lobbyist Thomas Corcoran, a Johnson acquaintance, telephoned the FBI to request the Cramer interview in his own name. Hoover scribbled on a memo a comment describing Corcoran as "the devious 'Tommy.'" When a top Hoover assistant objected that "we could very well be setting ourselves up as the bird in a badminton game," the director drew the line: "I agree—I think we should *keep out of this completely.*"

Hoover's "devious 'Tommy'" epithet was in character. From his vantage point at the FBI, he kept up a running commentary about the actors on the Washington stage both in memos for his files and in cryptic notes written in blue ink at the bottom of the papers that came across his desk.

On Oct. 28, 1941, reacting to a critic of the bureau, he wrote: "I do want to make certain that we do everything proper to thoroughly handle all aspects of this case so as not to give this little whelp any real basis for howling."

On March 7, 1959, at the bottom of a memo reporting controversy over remarks by Robert Kennedy, then engaged in his brother's presidential campaign, Hoover penned: "Re: Robert Kennedy—this is what happens when the prodigal son gets too far away from home and papa."

The Railroad Ride of Sumner Welles

Hoover's confidential files show how allegations of homosexuality in government during the 1940s, 1950s and 1960s damaged reputations and sometimes ruined careers.

One case involved Sumner Welles, scion of a rich and distinguished family who became under secretary of State in 1937. When Welles resigned in 1943, he cited his wife's poor health. The press speculated that Roosevelt had finally had enough of the constant feuding between Welles and Secretary of State Cordell Hull.

Hoover's records tell a more complicated story—one of a President who had reason to fear that his No. 2 man at the State Department was about to become the target of a congressional inquiry for alleged sexual misconduct.

The problem stemmed from a September, 1940, train trip taken by Roosevelt, Welles and other administration figures. A Secret Service agent reported after the journey that Welles had "propositioned a number of the train crew to have immoral relations."

Welles was an imperious man with many enemies. They got wind of the episode and immediately began retailing the story around the capital. One foe, William Bullitt, ambassador to France, wanted President Roosevelt informed, but he was afraid to deliver the bad news himself, fearing that the informant "would get his own legs cut off." Welles and FDR, two Eastern aristocrats, had long been friends.

When Roosevelt learned of the allegations, he ordered an FBI investigation. Hoover reported the results several weeks later, offering no conclusion on the validity of the charges. He quoted the patrician diplomat as saying he "had been drinking rather heavily" and remembered nothing about the trip except that he had become ill.

FDR chose to let the matter pass. But enemies of Welles made sure the whispering continued. Hoover described what happened next in memos for his files: Welles's boss and chief antagonist, Secretary Hull, called Hoover to his

Under Secretary of State Sumner Welles, right, with his rival, Cordell Hull. Incident on a train helped drive Welles from office.

apartment in October, 1942, and asked for a copy of the FBI's report. Hoover politely suggested that Hull get it from the White House. Hull said several senators' wives were buzzing about Welles's transgressions and that he was going to warn the White House of the risk of "considerable embarrassment unless some steps were promptly taken."

The next spring, Senator Owen Brewster (R-Me.), a frequent Roosevelt critic, spoke to Hoover about the "disgraceful action" of Welles and said he would press for a Senate investigation and a "report to the Senate." The tale of sin on the rails was beginning to reach journalistic ears, and in September, 1943, Hoover told Roosevelt aides that a Los Angeles police official and three persons from the Hollywood film industry were overheard talking about the alleged incident. Two weeks later, Welles was eased out of office.

A glimpse of Hoover's views on homosexuality can be seen in a 1953 memo recounting a conversation with Senator Joseph McCarthy (R-Wis.). Hoover recalled criticizing the State Department for considering homosexuality "strictly a personal matter." At the same time, Hoover told McCarthy that "it was very difficult to prove a charge of homosexuality" and that "it was often a charge used by persons who wanted to smear someone." From the government's standpoint, homosexuality was worrisome because it could lead to blackmail.

In a 1957 memo to top aides, the FBI chief wrote that three employes of the Eisenhower White House had resigned after being accused of homosexual acts.

In 1969, the FBI looked into an allegation by a Nixon White House aide—brought to the FBI's attention by a journalist—that three colleagues were homosexuals. FBI official Cartha DeLoach reported to Hoover that he had told the reporter that "the FBI of course could not sit on a story of this nature." DeLoach added that the "matter is of such consequence that [Hoover] may desire to personally advise the President."

Writing for his files, Hoover turned his wrath on the press. He suggested that the journalist was "a rat of the worst type." If he took no action, Hoover mused, the reporter "could say this information was supplied to the bureau . . . and it was hushed up by the White House or the Attorney General." On the other hand, Hoover noted that investigating the case would give the journalist an opportunity to write that the FBI was probing the charges. The three men "under oath emphatically denied" the allegations, apparently ending the matter.

The Director Is Accused

Hoover was hounded by persistent, but never substantiated, rumors that he himself was a homosexual—rumors fed by his practice of taking aide and fellow lifelong-bachelor Clyde Tolson along on out-of-town trips. The files show that the FBI chief and his agents took strong exception to—and sometimes action against— those who cast such slurs.

In 1944, for example, agents in the New York City field office told Hoover that a man they were interviewing had remarked that he "had heard a rumor to the effect that Mr. Hoover was a 'queer.' " Hoover scribbled on the report: "I never heard of this obvious degenerate. Only one with a depraved mind could have such thoughts."

The previous year, an agent reported to headquarters that an FBI employe had remarked at a bridge party in Cleveland that Hoover "was a homosexual and kept a large group of young boys around him." After the FBI's head agent in Cleveland called the employe into his office and "chastised her most vigorously," Hoover was told, she "thoroughly understood the untruth of her statements."

A 1951 episode sent agents further afield in defense of their boss. While having her hair done in a Washington, D.C., beauty parlor, an employe of the FBI heard the owner say Hoover was "a queer" and "was being paid off by bookies." Agents were promptly dispatched to interview the offending woman, who denied making the statements. In a three-page memo on the episode, bureau official L. B. Nichols lamented that such "women have so little to lose . . . and it is always difficult to catch up with gossiping rumormongers."

Stalking White House Hopefuls

Presidential elections worried Hoover: A new Chief Executive might someday end his long tenure at the FBI. At times, he helped the White House aspirants he liked.

In 1948, while Hoover was serving under President Truman, he worked behind the scenes as an adviser to Republican presidential nominee Thomas Dewey. The director's files show, for example, that Hoover told Dewey he saw "definite possibilities" in the candidate's proposal to force Communist Party members to register with the government. He promised to have material from the bureau's files flown to Dewey so he would have it the next morning.

Hoover deflected a move against an earlier GOP presidential candidate, Wendell Willkie. In 1940, he refused a request from Secretary of the Interior Harold Ickes that the FBI look into a report that Willkie had changed his name from "Wulkje." Hoover aide Edward Tamm advised that it would be "a serious mistake" for the Department of Justice to conduct political investigations.

Hoover took this advice in the Willkie matter, but sometimes acted differently when it came to liberal Democrats. The FBI, for example, kept an open file on Adlai Stevenson when he sought the Presidency in 1952 and 1956.

Hoover suspected the Illinois governor was sympathetic to Communism—a charge that is not supported by the documents released. Rumor, hearsay, trivia and unflattering newspaper stories fill the fat dossier. Agents had trouble spelling Stevenson's first name. It showed up in their reports as "Adley," "Adlee," "Adlei," "Adlai," "Adalai," "Adali," "Adelai" and "Adelaide." His last name at times was recorded as "Stephenson."

George McGovern was another Democratic presidential aspirant Hoover came to despise. In February, 1971, McGov-

ern lambasted Hoover for the forced resignation of an agent who had made the mistake of criticizing the FBI in a letter to a professor. Hoover's response to the McGovern attack was to order his 21 top aides to write "unsolicited" letters to the South Dakota senator lauding their boss. McGovern gleefully inserted the testimonials in the *Congressional Record*, poking fun at so transparent a move.

Hoover sought a way to get even. The director's confidential files show that thought was given to use of FBI "power" against McGovern. But the bureau's legal counsel, D. J. Dalbey, cautioned that it was better to let the controversy "fade out." He said that if McGovern "wants to be President, he'll have to run on something other than a campaign against the director. There is no act that would get political sympathy for McGovern quicker than the belief of the other politicians that the director had used the power at his disposal against McGovern. There is no gain here to justify the risk."

The Big Ears of Harry Truman

When Roosevelt died on April 12, 1945, and Harry Truman succeeded him, the new President's "Missouri Gang" of advisers found themselves competing with vast numbers of Roosevelt loyalists inside and outside the bureaucracy.

For help in keeping control over them, the new Chief Executive turned to his FBI director. The files show that Hoover obliged by setting up wiretaps on at least one administration official and on a prominent lobbyist.

The official was Edward Prichard, Jr., a 30-year-old lawyer who was Fred Vinson's top assistant. At the time of the wiretap, Vinson headed the Office of War Mobilization and Reconversion and then became Secretary of the Treasury.

The records do not reveal why Prichard specifically was tapped. Now an attorney in Lexington, Ky., Prichard suspects it was because he had expressed his "dim view" of Truman and the "numbskulls" he had brought into his administration after Roosevelt died. The wiretap on "PR"—as Prichard was identified in the FBI logs—began in May, 1945, and stopped when he left government and returned to Kentucky the next fall. "The whole thing is a damned outrage," he declares. "It was illegal as hell."

Along with the reports on "PR," the Truman White House got summaries almost daily from another tap: This one was on "CO"—Thomas Corcoran, a former New Deal braintruster who had become one of Washington's most potent lawyer-lobbyists. Truman feared that he would use his ties to friends throughout the government to thwart key administration policies.

The President asked Atty. Gen. Tom Clark to authorize surveillance in late 1945, because he wanted to make sure that Corcoran's "activities did not interfere with the proper administration of government," Hoover wrote in a confidential memo. The tapping went on until 1948, ending when Corcoran somehow learned that his phone was "loaded." In one of the final conversations recorded, he was overheard warning a caller, "Watch this telephone! There's a record on this phone! I'll call you over some other phone later in the afternoon, huh?"

Footnote: The Corcoran wiretap may have backfired on Truman and helped Hoover save his job. FBI agents heard a caller say that the President had told him he was seeking a way to remove Hoover without stirring a public protest. The director promptly wrote to a Truman aide telling him of the "loose talk" his agents had overheard—destroying any hope the White House may have had of taking Hoover by surprise.

Still More Secrets

The FBI's release of portions of Hoover's confidential files came in response to a Freedom of Information Act request by Athan Theoharis, a historian at Marquette University in Milwaukee. Theoharis sees the documents as "a very valuable collection, especially in terms of understanding how the bureau dealt with sensitive policy matters. They provide fascinating insights into the operations of the bureau under Hoover." Still, the 7,000 pages released tell only part of the story. Almost every page has been censored, ranging from the blacking out of certain names to the elimination of entire paragraphs.

In addition, the FBI has withheld altogether more than 10,000 other pages, citing national security, personal privacy or other grounds that exempt material from the Freedom of Information Act. Charging that the extent of the FBI's deletions is "totally unwarranted," Theoharis is asking Justice Department officials to release many more of the documents. But even if his appeal succeeds, hundreds if not thousands of pages are likely to remain sealed.

Decades more could pass before the world learns the last of J. Edgar Hoover's secrets. □

By ORR KELLY with TED GEST and JOSEPH P. SHAPIRO

William Webster has been FBI director since 1978.

FBI Today: Living by New Rules

In the dozen years since J. Edgar Hoover died, far-reaching reforms have been adopted by Congress, the executive branch and the FBI itself to discourage what a special Senate committee has called misuse of the bureau's power—

- No director will be able to perpetuate himself in office decade after decade. The law sets a fixed 10-year term for FBI chief William Webster and his successors.
- Court approval is required for all electronic surveillance in domestic and national-security cases.
- Guidelines issued by the Attorney General tell the bureau what it may and may not do. Although recently relaxed, such rules have led to a sharp decrease in the FBI's gathering of information on political groups.
- Actions of the FBI are monitored by outsiders more than ever before—by the public, through use of the Freedom of Information Act, and by congressional intelligence committees.
- The FBI no longer maintains the special political files Hoover kept at his elbow. Civil libertarians warn, however, that there is no cause for complacency. They note that the bureau's main files still contain a reservoir of sensitive information on millions of Americans.

Senator LEAHY. I look at some of these things that have come out of FOIA, and I do not think any one of us ever wants to go to a closed society. We have disadvantages, certainly, in this country as an open society, but one of the advantages we always speak of is that we are better off than the Soviets with their closed society, and I am sure nobody is suggesting that we go to either a closed society or a police state. But I would remind everybody that it was under FOIA that we found out, for example, that the FBI had maintained investigatory files of reporters whose views they disagreed with, such as the Washington Post's Alfred Friendly, or we found out that the FBI created a thick dossier on Albert Einstein, because they thought he was the head of a Communist spy ring.

We found out about the CIA's project which used unknowing American citizens to conduct drug-induced mind-control experiments.

Now, I like to think we can tighten up in a number of ways of congressional oversight on these things, but I am not convinced that we are never going to have administrations, Republican or Democrat, that are not going to either make mistakes or get themselves involved in things that they should not do, and I like to think that the FOIA gives a protection to those who are outside the Government, to make sure their Government follows the law, all of us, and that the Government does not make mistakes. Notwithstanding my strong support of FOIA, I have worked very hard to tighten up some things where I think some changes should be made, especially in the law enforcement area, and I think that we have worked that out. But I am afraid that if we start going off in a shotgun fashion, we may find that nothing in the way of changes in FOIA will pass this year at all. Now, we have passed one bill unanimously in the Senate, with some major changes, which Senator Hatch and I worked on. We passed significant legislation that the Senate Intelligence Committee requested. But I could see the whole thing coming to a screeching halt if we stray off those paths.

Senator HATCH. Well, if the Senator would yield, I think there is some merit to what the Senator has been saying, but I would also like to point out that since there is no way to know how much a requester might know about an investigation or what little piece of information might be vital to his understanding of the status of an investigation or the identity of an informant, no one could decide with certainly what can be segregated out of a sensitive document for release. Thus, with respect to confidential law enforcement, I have to admit that Senator Denton's recommendation has some merit. I think that just needs to be pointed out. I think Senator Leahy has been fair in pointing out his side, and you have been fair in pointing out yours.

Senator DENTON. I appreciate any help you can give me, Mr. Chairman, since I am not, as I say and have said many times, a lawyer. However, I have dealt with questions like this all my life, in my previous profession, and I am quite aware and agree with the Senator from Vermont, about abuses which took place. I was not in this country when they were taking place, nor aware of them, but I understand that they took place, and I understand that there is a great need for the Freedom of Information Act and the Privacy Act.

So I would not wish to be lumped into a category, nor do I necessarily know firsthand that Mr. Casey said he would do away with the FOIA altogether. I do not wish to do away with the FOIA. I note that there are already nine exemptions, and I am asking that the foreign counterintelligence field and terrorism be added. I think that they are at least as necessary as classified documents concerning national defense, foreign policy, internal personnel rules and practices, information specifically exempt from disclosure under other laws, trade secrets, internal communications such as those protected by attorney-client privilege—we are very careful about attorney-client privilege—protection of privacy, such as medical records, and all of that.

I do not see why we do not want to stop our intelligence people dying in the line of their duty because some crook or some spy can write in and ask "Who informed on me?" I do not see that being an abuse of civil rights at all.

Senator LEAHY. You do not see those as covered already by the exemptions we have written in?

Senator DENTON. No, sir, and neither does the Director of the FBI.

Senator HATCH. Thank you, Senator.

Thank you, Senator Denton. We appreciate the testimony you have presented here today and the efforts you have put forth in these areas. Thank you so much.

Senator DENTON. Thank you, Mr. Chairman and members of the subcommittee.

Senator HATCH. At this point, we will call on our other friend and Senator from Minnesota, Senator Durenberger.

Senator, we will be happy to take your testimony into the record at this time. We welcome you before the committee and look forward to hearing from you.

STATEMENT OF HON. DAVE DURENBERGER, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator DURENBERGER. I thank you, Mr. Chairman.

I am pleased that you have agreed to hold this hearing today and delighted to be able to testify on S. 1335, the the Freedom of Information Protection Act.

Mr. Chairman, I also want to thank my colleague, Senator Leahy, for his authorship of this legislation and for his comments about the need to codify common sense. That is what I will try to elaborate on this morning.

Mr. Chairman, the immediate cause for the Freedom of Information Protection Act is certain unfortunate aspects of the latest Executive order relative to national security information. But the bill has its roots in a whole generation of efforts to develop a government secrecy policy.

That secrecy goes back, if you will, to the Revolutionary War, and the protection of military secrets grew notably during and after the First World War in this century. But our modern classification system, applied to diplomatic as well as military secrets and supported by Executive orders, really is a product of the Roosevelt and Truman administrations in the Second World War period.

President Truman's Executive order of 1948 was so broad as to cause great concern in this country. So it was President Eisenhower who began the march toward more openness in this area with his Executive order of 1953. That order limited who could classify information, did away with one level of classification, and introduced declassification policies.

Later in Eisenhower's administration, a Defense Department study called for "a determined attack on overclassification and an active declassification program." At the same time, a bipartisan commission called for the abolition of the "confidential" classification for all future defense information materials.

During the Nixon administration, continued study was given to the problem of secrecy. The Defense Science Board in 1969 set up a Task Force on Secrecy. The Chairman of that Board was Dr. Robert L. Sproull, former head of the Defense Advanced Research Projects Agency and now president of the University of Rochester, who will be testifying shortly.

I will note just a couple of the important conclusions of that task force, because they are relevant to the task before us, and I quote:

> It is unlikely that classified information will remain secure for periods as long as 5 years, and it is more reasonable to assume that it will become known to others in periods as short as 1 year.
>
> The amount of scientific and technical information which is classified could profitably be decreased perhaps as much as 90 percent.
>
> Specifically, it is recommended that the present emphasis that promotes classification be reversed to discourage classification by requiring in each instance of classification: A meaningful written justification by the initiator of the classification action.

That is the end of the quotations from that report.

Our final advice on this subject came from Justice Potter Stewart, in his famous concurring opinion in *New York Times Company* v. *United States,* in 1971. He said:

> For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless and to be manipulated by those intent on self-protection or self-promotion.

All of these studies, Mr. Chairman, had an effect. The Nixon Executive order in 1972 praised the Freedom of Information Act and held bureaucrats accountable for any unnecessary classification or overclassification. It also incorporated a far-reaching system of systematic and automatic declassification.

In 1978, the Carter Executive order actually cut back on some of that automatic declassification. But it added the "balancing test" between "the need to protect information" and "the public interest in disclosure." It also required that confidential information be tied to "identifiable" damage to the national security that might result from its release. That, Mr. Chairman, is a far cry from abolishing the confidential category, as recommended during the Eisenhower administration, but it is a clear effort to discourage unnecessary classification. And both the Nixon and the Carter orders led to dramatic drops in the number of persons authorized to classify information.

Against that heartening progress over nearly 30 years, the most recent Executive order stands out as a clear and unnecessary break with the past. Gone is the "identifiable damage" criterion. Gone is

the "balancing test." Gone are mandatory systematic review and automatic declassification. And clearly reversed is the basic thrust toward maximum openness, consistent with the national security, that had guided the two previous orders.

Hence, the bill I am presenting to you, the Freedom of Information Protection Act. For we cannot avoid the responsibility for protecting FOIA from foolish bureaucrats who thrive in secrecy and expect the country to do the same.

You know, Mr. Chairman, as I do, that the way people operate around this place is on the theory that information is power. And the lower you are in the pecking order, the more valuable information is as a tool of power. So this bill is basically designed to affect bueaucratic routine, in an effort to get some reality into the declassification process.

What will S. 1335 do? It is a very simple bill. It will reestablish a standard of thoughtfulness for the declassification decisions that are promoted by FOIA requests. By doing so, it will also encourage thoughtfulness in other declassification decisions.

Briefly, S. 1335 applies only to the (b)(1) exemption in FOIA for classified information. It does not apply to other exemptions like the statutory exemptions you have been talking about in the last hour or so, or the one for law enforcement information. It requires that information withheld under the (b)(1) exemption meet both the "identifiable damage" standard and the "balancing test." That, in effect, restores the past. Now we improve on the past in one way. The bill limits judicial review of the balancing test to ascertaining that the agency withholding the information did, in fact, strike that balance. It does not argue with the result. This limit answers the executive branch's basic concern at the time that they eliminated the "balancing test."

This bill applies only to FOIA declassification decisions, not to the whole classification system. And it does not raise the substantive standard for classification or declassification. It does require that agencies think through each individual case and consider all the relevant factors, and it will make clear our concern over increased secrecy in Government.

Why is that important? Why does it warrant legislation to deal with the effect of an Executive order on one FOIA exemption?

The reason is, Mr. Chairman, that the Freedom of Information Act strikes the critical balance that is unique to America, between openness and secrecy, that permits us to maintain a democracy while keeping large amounts of information secret.

We all know that some information must be kept secret. We do not always realize, however, how important it is that some of that information be made available for public scrutiny, and how important it is that the public have confidence in its ability to gain access to some of that information when it is safe to do so.

Those in our Government who possess information and have the responsibility to protect the secrecy of that information also have the right to hide it from the public, to release it to the public, or to give it to others who can share that information. The public does not have those rights.

Some classified information bears directly upon issues on which we and the public make decisions: the difficulty of verifying arms

control agreements, for example; the murder of American nuns in El Salvador; problems of military preparedness. When a journalist or an historian receives declassified information on such topics through FOIA, we all as a society benefit from the ability to debate those issues with a better factual base. When too much information is bottled up, then we suffer the wars of leaks and counterleaks in place of rational discussion.

Other classified information may give a bereaved family information about the death or disappearance of a loved one, or it may show a private citizen what information the Government has collected about him. This society has granted its Government, for very, very good reasons, rights to gather information on people and to keep some of that information secret. The public's consent to this depends at least in part on its sense that people can obtain the Government's records on them.

If we allow restrictive Executive orders and routinized FOIA decisions to change that perception, then we risk losing the popular consent on which the whole classification system rests. It is for these reasons that the Senate Select Committee on Intelligence unanimously advised the President of the United States not to dispense with the "identifiable damage" standard, not to dispense with the "balancing test." That is also why all my cosponsors on this legislation are current or former members of the Senate Select Committee on Intelligence. We know the need for classified information. We also know that the system of classification will survive only so long as the people have confidence in it.

I am sure that we all receive letters from constituents recounting impersonal treatment of their FOIA requests. My State includes everybody from the former skipper of the U.S.S. *Liberty* to an anthropologist studying the Hmong people of Kampuchea. These people deserve a Government that considers their FOIA requests thoughtfully, rather than relying upon rote decisionmaking. My constituents deserve that consideration, and so do yours.

S. 1335 is a simple bill. It is only a beginning, but it is a good place to start. It corrects problems, rather than trying to set up a whole new system. And importantly, it will send a clear signal to the security bureaucrats. This bill will say that Congress meant it when it passed FOIA. It will tell them: "Think, before you reject those requests," and will keep this country on the highway to greater openness, rather than the dead-end street of secrecy.

Mr. Chairman, several organizations and individuals have called my office in the last few days to express regret that they were not invited to testify here today. I would hope that you would be able to leave the record open for a couple of weeks after this hearing, so that those persons and groups could submit written statements on this bill.

With that, I will thank you especially for your thoughtfulness and for making it possible for us to have this hearing.

Senator HATCH. Thank you, Senator Durenberger.

We will be happy to keep the record open for 2 weeks for statements from people who are expressly concerned about this particular bill and these issues.

Senator DURENBERGER. Thank you.

Senator HATCH. Senator Durenberger, we would like to invite you to come up here and sit with us, as we introduce the next panel.

I have to go and introduce some Utah constituents. Senator Leahy, could you preside?

Senator LEAHY. Well, Mr. Chairman, I was about to leave for another meeting, myself.

Senator HATCH. Well, Dave, you are it. Why don't you come up here?

Senator DURENBERGER. I was on my way to the doctor.

Senator HATCH. Well, how lucky you are. You get to finish these hearings.

I apologize, but I have a Utah constituent that I need to go and introduce to the Communications Subcommittee, if I can.

Our next four witnesses will be a panel. I will call on Mr. Steven Garfinkel, Director of the Information Security Oversight Office of the General Services Administration; Mary Lawton, Counsel for Intelligence Policy and Review of the Department of Justice; Mark Lynch, of the American Civil Liberties Union, and Robert Sproull, the President of the University of Rochester.

I would like to ask each of you witnesses to summarize your prepared statements so that we can place them in the record, and if you can summarize, it would be very much appreciated, I know, by Senator Durenberger and myself. But we will place all prepared statements in the record as though fully delivered.

Thank you for being here. We are happy to welcome you before the committee. We will begin with you, Mr. Garfinkel.

Let's also leave the record open so that we can have anybody on this committee submit questions in writing to any of the witnesses who have appeared here today.

Mr. Garfinkel?

[Whereupon, Senator Durenberger assumed the chair.]

STATEMENT OF A PANEL, INCLUDING STEVEN GARFINKEL, DIRECTOR, INFORMATION SECURITY OVERSIGHT OFFICE, GENERAL SERVICES ADMINISTRATION; MARY LAWTON, COUNSEL FOR INTELLIGENCE POLICY AND REVIEW, DEPARTMENT OF JUSTICE; MARK LYNCH, AMERICAN CIVIL LIBERTIES UNION; AND DR. ROBERT L. SPROULL, PRESIDENT, UNIVERSITY OF ROCHESTER

Mr. GARFINKEL. Thank you very much, Mr. Chairman.

As requested, I will attempt to summarize the more critical parts of my statement.

In 1982, the President issued a new Executive order on national security information, Executive Order 12356, which replaced Executive Order 12065, introduced by President Carter in 1978. There were a number of reasons for revising Executive Order 12065. ISOO discussed these reasons in an article entitled, "The Background of Executive Order 12356," which appeared in ISOO's Annual Report to the President for fiscal year 1982.

With the permission of the committee, I propose to enter this article into the record as an appendix to my statement.

Senator DURENBERGER. Without objection, it will be made a part of the record along with your statement.

Mr. GARFINKEL. None of the reasons for issuing Executive Order 12356 was the one that has been repeatedly cited in the popular media—that is, to increase the types and quantity of information that may be classified and thereby protected from public disclosure.

Because classifiers read the newspapers, it has been this assertion and several like it that ISOO and its agency counterparts have sought to contradict in their oversight programs. Fortunately, the combination of a credible, efficient information security system and effective oversight has proved the critics of Executive Order 12356 wrong. I quote from my letter transmitting ISOO's Annual Report to the President for Fiscal Year 1983:

> As the report reveals, to date, Executive Order 12356 has achieved the standard you announced in issuing it. The Order enhances protection for national security information without permitting excessive classification of documents by the government. In fact, the number of original classification decisions, which is the most important measurement of classification activity, decreased by almost 200,000 actions in fiscal year 1983. This reduction is an unprecedented accomplishment, especially in the context of improved protection for national security information.

With the permission of the subcommittee, I offer into the record of this hearing a copy of ISOO's fiscal year 1983 annual report.

Senator DURENBERGER. Without objection, we will make it part of the record.

Mr. GARFINKEL. It reveals a number of other facts that contradict the myths about Executive Order 12356 that continue to thrive on idle speculation and hearsay. Please permit me to cite some examples—and with your permission, Senator Durenberger, I am going to skip to the fourth example that I cite, since that begins with those that are relevant to S. 1335.

Myth No. 4. "By dropping the modifier, identifiable, from the standard of damage that is the threshold of classification, the order broadens the scope of classification."

The threshold for classification in Executive Order 12065 was "identifiable damage to the national security." In the revised order, as was the case in the pre-1978 orders, the threshold is "damage to the national security." "Identifiable" has been dropped, not to increase the scope of permissible classification, but to avoid an ambiguous and unnecessary word that is subject to inconsistent and inaccurate interpretation.

Senator DURENBERGER. Are you going to give us some examples?

Mr. GARFINKEL. The statement will give one example.

When added to the 1978 order, it was intended that the inclusion of the word "identifiable" would put the classifier on notice of the requirement for a conscious, if somewhat subjective, analysis of prospective damage to the national security from the unauthorized disclosure of the information. Instead, litigants seized upon the word as a qualitative or quantitative modifier of damage; that is, they argued that the damage to the national security must be of a particular type or amount in order to classify the relevant information.

For example, in one lawsuit, plaintiffs argued that the disclosure of certain intelligence sources would not result in "identifiable" damage to the national security, because the prospective harm to

those sources was merely speculative. The deletion of "identifiable" eliminated this sort of bizarre logic. It has had no impact whatsoever on the quality or quantity of classification decisions. Its reinstatement through the enactment of S. 1335 is both unnecessary and unsound.

Myth No. 5. "The order forbids the classifier or declassifier from considering the public interest in disclosure." This myth evolves from the absence of the so-called balancing test in Executive Order 12356. The "balancing test" was a provision in Executive Order 12065 that was intended to encourage agency heads, in their sole discretion, to release information that met the requirements for classification if they determined that there was an overriding public interest in disclosure.

The problem with the "balancing test" had nothing to do with its endorsement of openness. Balancing the public interests served by either protection or disclosure is an inherent part of both the classification and declassification processes, and it remains so under the current system. Rather, it was the real and potential misapplication of the "balancing test" in the context of litigation that necessitated its demise. Lawyers argued, sometimes successfully, that the test was not discretionary, and persuaded some judges to second-guess the responsible agency head, even though it was agreed that the information met the requirements for classification. As a result, agencies were required to expend large amounts of time and money and to reveal increasingly more sensitive information in order to defend these lawsuits.

Significantly, in none of these maneuverings did a plaintiff requester ever gain access to information over which an agency maintained classification. In other words, researchers did not benefit from the "balancing test" before and would not benefit from its reinstatement now.

Senator DURENBERGER. So, it is your testimony that having the "balancing test" and "identifiable" damage standards in there is really no problem except for the lawyers, and when the lawyers get into it, then it becomes a problem; otherwise, it is not a problem for the classifiers nor is it for declassifiers.

Mr. GARFINKEL. I think that is correct. Among the reasons for amending Executive Order 12065 are reasons relating to the burdens of litigation under the FOIA's first exemption, and the two primary reasons were the existence of the "balancing test" and the "identifiable damage" standard. The reason for their deletion had nothing to do with handling the standard of "identifiable damage" or the administrative process of considering the competing interests in disclosure or protection of the information.

Senator DURENBERGER. That is a point at which you and I might disagree, but at least your testimony is that it is only the litigious nature of—the words, in effect—that you object to.

Mr. GARFINKEL. That is correct.

It would appear that the only potential beneficiaries of its reinstatement through enactment of S. 1335 will be the nonprevailing lawyers, who will religiously seek imposed attorneys fees notwithstanding the final resolution of the suit.

Mr. Chairman and members of the subcommittee, perhaps more significant than the successes of the past year are the commit-

ments for fiscal year 1984 and beyond. In a letter to me dated March 23, 1984, the President, though grateful for past successes, emphasized continued improvement in the administration of the information security program. I quote from the President's letter:

> I ask for the same commitment in the future to improving our performance even more. We must continue to ensure that information is being classified only when this extraordinary protection is necessary; that those entrusted with access to national security information appreciate the seriousness of their responsibility to safeguard it; and that systematic review and other declassification efforts are made in accordance with the Order's goal of making information no longer requiring security protection available to the public.

Members of the subcommittee, with your permission, I offer the entirety of the President's letter into the record of this hearing.

Senator DURENBERGER. Without objection, it will be made a part of the record.

Mr. GARFINKEL. Members of the subcommittee, the Government's information security program is not only working; it is working well. It will not be improved through the enactment of S. 1335, but it could be damaged. I urge you to reject this legislation.

That concludes my statement.

Senator DURENBERGER. Thank you.

[The following was received for the record:]

PREPARED STATEMENT OF STEVEN GARFINKEL

Mr. Chairman and Members of the Subcommittee:

As you consider S. 1335, I welcome the opportunity to appear before you today to respond to your questions about the executive branch's security classification program. The Administration strongly opposes this legislation on both program and legal grounds. I will focus on the program aspects of this opposition, and Mary Lawton, Counsel for Intelligence Policy at the Department of Justice, will focus on the legal aspects.

I am the Director of a small and somewhat unusual executive branch office known as the Information Security Oversight Office, or ISOO. ISOO is responsible for overseeing the information security program throughout the executive branch and for reporting annually to the President on the status of that program. The information security program encompasses the classification, declassification and safeguarding of national security information. National security information is, of course, referenced by the first statutory exemption to the Freedom of Information Act, which S. 1335 would amend.

ISOO is an administrative component of the United States General Services Administration, but receives its policy and program direction from the National Security Council. The Administrator of General Services appoints the ISOO Director upon approval of the President. I have served as ISOO Director since May 1980.

In 1982, the President issued a new Executive order on national security information, E.O. 12356, which replaced E.O. 12065, introduced by President Carter in 1978. There were a number of reasons for revising E.O. 12065. ISOO discussed these reasons in an article entitled, "The Background of Executive Order 12356,"

which appeared in ISOO's Annual Report to the President for FY 1982. With your permission, Mr. Chairman, I propose to enter this article into the record as an appendix to my statement.

None of the reasons for issuing E.O. 12356 was the one that has been repeatedly cited in the popular media: that is, to increase the types and quantity of information that may be classified, and thereby protected from public disclosure. Because classifiers read the newspapers, it has been this assertion and several like it that ISOO and its agency counterparts have sought to contradict in their oversight programs. Fortunately, the combination of a credible, efficient information security system and effective oversight has proved the critics of E.O. 12356 wrong. I quote from my letter transmitting ISOO's Annual Report to the President for FY 1983:

> As the Report reveals, to date E.O. 12356 has achieved the standard you announced in issuing it: "The Order enhances protection for national security information without permitting excessive classification of documents by the Government." In fact, the number of original classification decisions, which is the most important measurement of classification activity, decreased by almost 200,000 actions in FY 1983. This reduction is an unprecedented accomplishment, especially in the context of improved protection for national security information.

Mr. Chairman and Members of the Subcommittee, with your permission I offer into the record of this hearing a copy of ISOO's FY 1983 Annual Report. It reveals a number of other facts that contradict the "myths" about E.O. 12356 that continue to thrive on idle speculation and hearsay. Please permit me to cite some examples:

> MYTH NO. 1: The new Executive order on national security information has resulted in widespread increases in the amount of classified information.

To the contrary. As noted above, ISOO's Report reveals an unprecedented downturn in the number of original classification actions during the first full year of the revised system. In FY 1983, original classification was down by almost 200,000 actions, or 18 percent from the previous year. In addition, most of this reduction occurred in the higher classification levels, "Secret" and "Top Secret."

In introducing S. 1335, its sponsor stated: "My bill will prevent excessive secrecy from undermining the Freedom of Information Act." Mr. Chairman, I submit that E.O. 12356 is already preventing excessive secrecy from undermining the Act.

MYTH NO. 2: The new Executive order provides, "When in doubt, classify."

This myth has been in print so many times that I doubt that the authors will ever get around to reading what they are quoting. It's bad enough when I see this in a newspaper. It really hurts when it appears, as it has over and over again, in scholarly journals published for historians and scientists. The Executive order does not say, "When in doubt, classify." It says, in effect, "When in doubt, find out, and do it within 30 days." There is no rule in this Order that requires a decision by rote rather than reason.

MYTH NO. 3: The new Executive Order sets us back thirty years because it abolishes the concept of automatic declassification.

The new Executive Order does not eliminate automatic declassification. Rather, it requires that automatic declassification be tied to a specific date or event, the passage of which will ensure the lapse of national security sensitivity. The prior Order, honored in the breach over 90 percent of the time, fixed automatic declassification to an arbitrary period of

years that may or may not have had any relevance to the sensitivity of the information. And contrary to the prediction of its critics, under the new Executive order classifiers are marking documents for automatic declassification at a rate three and one-half times higher than under the prior Order.

MYTH NO. 4: By dropping the modifier "identifiable" from the standard of damage that is the threshold of classification, the Order broadens the scope of classification.

The threshold for classification in E.O. 12065 was "identifiable damage to the national security." In the revised Order, as was the case in the pre-1978 Orders, the threshold is "damage to the national security." "Identifiable" has been dropped, not to increase the scope of permissible classification, but to avoid an ambiguous and unnecessary word that is subject to inconsistent and inaccurate interpretation.

When added to the 1978 Order, it was intended that the inclusion of the word "identifiable" would put the classifier on notice of the requirement for a conscious, if somewhat subjective, analysis of prospective damage to the national security from the unauthorized disclosure of the information. Instead, litigants seized upon the word as a qualitative or quantitative modifier of damage; that is, they argued that the damage to the national security must be of a particular type or amount in order to classify the relevant information. For example, in one lawsuit plaintiffs argued that the disclosure of certain intelligence sources would not result in "identifiable" damage to the national security, because the prospective harm to those sources was merely speculative. The deletion of "identifiable" eliminated this sort of bizarre logic. It has had no impact whatsoever on the quality or quantity of classification decisions. Its reinstatement through the enactment of S. 1335 is both unnecessary and unsound.

MYTH NO. 5: The Order forbids the classifier or declassifier from considering the public interest in disclosure.

This myth evolves from the absence of the so-called "balancing test" in E.O. 12356. The "balancing test" was a provision in E.O. 12065 that was intended to encourage agency heads, in their sole discretion, to release information that met the requirements for classification if they determined that there was an overriding public interest in disclosure.

The problem with the "balancing test" had nothing to do with its endorsement of openness. Balancing the public interests served by either protection or disclosure is an inherent part of both the classification and declassification processes, and it remains so under the current system. Rather, it was the real and potential misapplication of the "balancing test" in the context of litigation that necessitated its demise. Lawyers argued, sometimes successfully, that the test was not discretionary, and persuaded some judges to second-guess the responsible agency head, even though it was agreed that the information met the requirements for classification. As a result, agencies were required to expend large amounts of time and money and to reveal increasingly more sensitive information in order to defend these lawsuits.

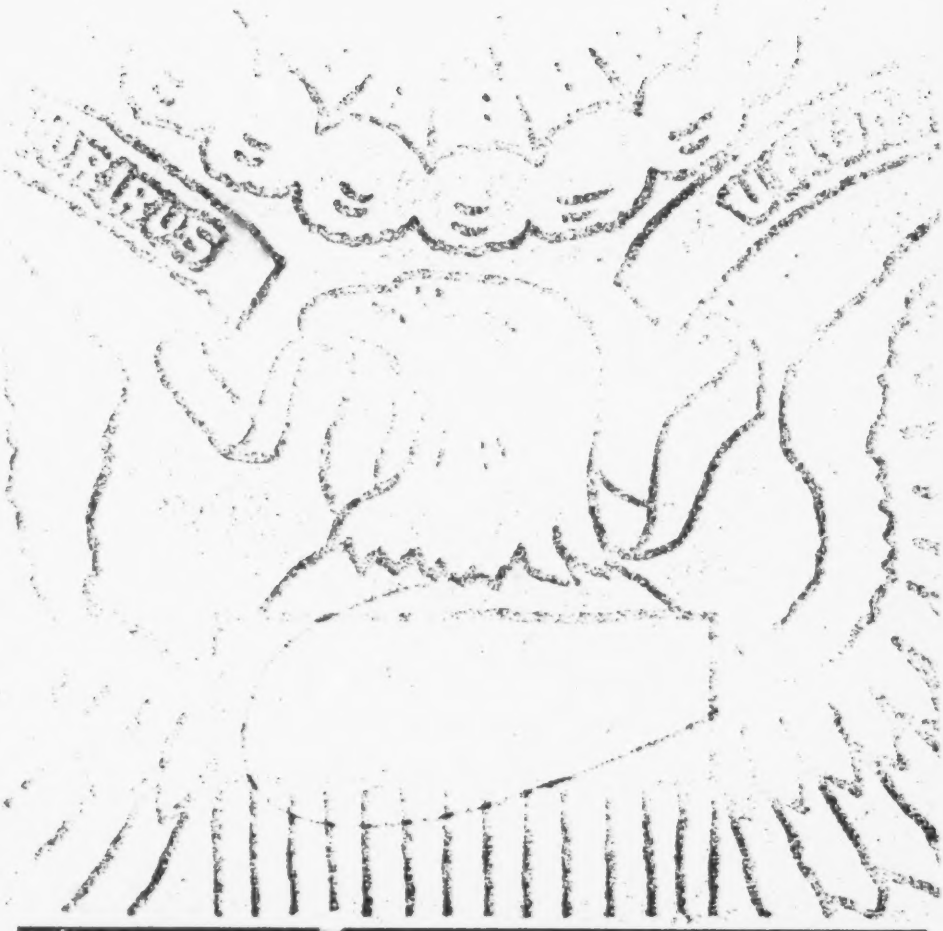
Significantly, in none of these maneuverings did a plaintiff requester ever gain access to information over which an agency maintained classification. In other words, researchers did not benefit from the "balancing test" before, and would not benefit from its reinstatement now. It would appear that the only potential beneficiaries of its reinstatement through enactment of S. 1335 will be the non-prevailing lawyers, who will religiously seek imposed attorneys fees notwithstanding the final resolution of the suit.

Mr. Chairman and Members of the Subcommittee, perhaps more significant than the successes of the past year are the commitments for FY 1984 and beyond. In a letter to me dated March 23, 1984, the President, though grateful for past successes, emphasized continued improvement in the administration of the information security program.

> I ask for the same commitment in the future to improving our performance even more. We must continue to insure that information is being classified only when this extraordinary protection is necessary; that those entrusted with access to national security information appreciate the seriousness of their responsibility to safeguard it; and that systematic review and other declassification efforts are made in accordance with the Order's goal of making information no longer requiring security protection available to the public.

Mr. Chairman, with your permission I offer the entirety of the President's letter into the record of this hearing.

Mr. Chairman and Members of the Subcommittee, the Government's information security program is not only working, it is working well. It will not be improved through the enactment of S. 1335, but it could be damaged. I urge you to reject this legislation.



Annual Report to the President FY 1983

Information Security Oversight Office

General Services Administration
Information Security Oversight Office
Washington, DC 20405

March 16, 1984

The President
The White House
Washington, DC 20500

Dear Mr. President:

I am pleased to submit the Information Security Oversight Office's (ISOO) 1983 Report to the President.

Established under Executive Order 12065 and continued under Executive Order 12356, effective August 1, 1982, the ISOO oversees the information security system throughout the executive branch. The ISOO is an administrative component of the General Services Administration, but receives its policy direction from the National Security Council.

FY 1983 was a critical year for the information security system. It encompassed the first full year of E.O. 12356's operation, a period of time in which the information security program received extraordinary attention. I am delighted to report that the new Executive Order and the system established under it have passed their initial tests in outstanding fashion.

As the Report reveals, to date E.O. 12356 has achieved the standard you announced in issuing it: "The Order enhances protection for national security information without permitting excessive classification of documents by the Government." In fact, the number of original classification decisions, which is the most important measurement of classification activity, decreased by almost 200,000 actions in FY 1983. This reduction is an unprecedented accomplishment, especially in the context of improved protection for national security information.

The Report also reveals certain areas of the program that require greater efforts to reach the goals that you have established. The ISOO continues to work with the agencies that create or handle classified information to fulfill these requirements in FY 1984 and beyond.

Respectfully,

Steven Garfinkel

STEVEN GARFINKEL
Director

Agency Acronyms or Abbreviations Used in this Report

ACDA	:	Arms Control and Disarmament Agency
AID	:	Agency for International Development
CEA	:	Council of Economic Advisors
CIA	:	Central Intelligence Agency
COMMERCE	:	Department of Commerce
DoD	:	Department of Defense
DoE	:	Department of Energy
DoT	:	Department of Transportation
FEMA	:	Federal Emergency Management Agency
GSA	:	General Services Administration
ISOO	:	Information Security Oversight Office
JUSTICE	:	Department of Justice
NARS	:	National Archives and Records Service
NASA	:	National Aeronautics and Space Administration
NRC	:	Nuclear Regulatory Commission
NSC	:	National Security Council
OMSN	:	Office of Micronesian Status Negotiations
OPIC	:	Overseas Private Investment Corporation
OSTP	:	Office of Science and Technology Policy
OVP	:	Office of the Vice President
STATE	:	Department of State
TREASURY	:	Department of the Treasury
USDA	:	Department of Agriculture
USIA	:	United States Information Agency

Summary of FY 1983 Program Activity

The FY 1983 Report to the President is the first to examine operations under E.O. 12356. The following data highlight ISOO's findings for FY 83:

Classification Activities

- The number of original classification authorities continued to decline in FY 83. The number of original classifiers has declined from nearly 60,000 in 1972, to 7,010 at the end of FY 83, almost a 90% reduction.
- Agencies made 864,099 original classification decisions, almost 200,000 (18%) fewer than in FY 82.
- By classification level, 2% of original classification decisions were "Top Secret", 32% were "Secret", and 66% were "Confidential".
- Agencies assigned a date or event for automatic declassification to 35% of all information originally classified, as compared to an estimated 10% rate experienced under E.O. 12065.
- Agencies made approximately 17 million derivative classification decisions, a 4% increase over FY 82.
- 5% of all classification decisions were original, 95% were derivative.
- The total of all classification decisions was approximately 18 million, a 3% increase over FY 82.

Declassification Activities

- Agencies received 3,945 new mandatory review requests, 47% fewer than in FY 82.
- Agencies processed 3,610 mandatory review requests, and declassified the information in whole or in part in over 90% of the cases. In processing these requests, agencies reviewed over 29,000 documents comprising nearly 175,000 pages.
- Agencies received 411 new mandatory review appeals.
- Agencies processed 363 mandatory review appeals, declassifying additional information in whole or in part in almost 50% of the cases.
- Agencies systematically reviewed for declassification 12,407,523 pages of classified information, and declassified 7,848,295 (63%). The number of pages reviewed was 36% less than in FY 82. The agencies that now voluntarily perform systematic review accounted for 77% of total number of pages reviewed.

Inspections

- Agencies conducted 22,245 self-inspections, 21% fewer than in FY 82.
- Agencies reported 18,344 infractions, almost 10% fewer than in FY 82.

Information Security Oversight Office
The Information Security Program
FY 1983

The Information Security Oversight Office (ISOO), established by Executive Order 12065 on December 1, 1978, operates now under the provisions of Executive Order 12356, effective August 1, 1982. ISOO is responsible for overseeing the information security programs of all executive branch activities that create or handle national security information. E.O. 12356 also requires the Director of ISOO to report annually to the President on the progress of executive branch agencies in implementing the Order's provisions. In monitoring the program, ISOO oversees the information security programs of approximately 65 departments and independent agencies or offices of the executive branch. This is the first ISOO report that assesses the operations of the information security program under Executive Order 12356.

ISOO is located administratively in the General Services Administration but receives its policy direction from the National Security Council. The Administrator of General Services appoints the ISOO Director upon approval of the President. The ISOO Director appoints the staff, which numbers between 13-15 persons. ISOO funding is included in the budget of the National Archives and Records Service. For FY 1983, ISOO's budget was $579,600.

ISOO meets its assigned responsibilities under E.O. 12356 by: (a) developing and issuing implementing directives and instructions regarding the Order; (b) conducting on-site inspections or program reviews of monitored agencies; (c) gathering, analyzing and reporting statistical data on agencies' programs; (d) evaluating, developing or disseminating security education materials and programs; (e) receiving and taking action on suggestions, complaints, disputes and appeals from persons inside or outside the Government on any aspect of the administration of the Order; (f) conducting special studies on problem areas or programs developed to improve the system; and (g) maintaining continuous liaison with monitored agencies on all matters related to the information security program. This evaluation of the executive branch's information security program for FY 1983 is based upon program reviews and inspections conducted by the ISOO staff and the compilation and analysis of statistical data regarding program activity.

Program Reviews and Inspections

ISOO program analysts serve as liaison to specific agencies to facilitate coordination and to provide for continuity of oversight operations. The analysts must stay abreast of relevant activities within each agency's information security program; coordinate with assigned agency security counterparts on a continuing basis; and conduct formal inspections of the agency's program in accordance with a planned annual inspection schedule.

These on-site formal ISOO inspections encompass all aspects of the information security program, including classification, declassification, safeguarding, security education and training, and administration. The inspections always include detailed interviews with agency security personnel, classifiers, and handlers of national security information. To the maximum extent possible, ISOO analysts review a sampling of classified information in the agency's inventory to examine the propriety of classification, the existence of necessary security markings and instructions, and compliance with safeguarding procedures. ISOO analysts also monitor security education and training programs to determine if they adequately inform appropriate personnel about classifying, declassifying, marking and safeguarding national security information. When deficiencies in an agency's program are noted, ISOO analysts recommend corrections, either on-the-spot or as part of a formal inspection report. Critical reports require immediate remedial attention by the agency prior to a follow-up inspection by ISOO. These inspections are a necessary means of identifying and resolving problem areas. They provide positive indicators of agency compliance or non-compliance with the Executive order that are not apparent simply from the analysis of statistical data.

Statistical Reporting

To gather relevant statistical data regarding each agency's information security program, ISOO developed the Standard Form 311. ISOO revised the SF 311 as a result of the issuance of E.O. 12356. ISOO now requires that each agency report the following information to it on an annual basis:

1. The number of original classification authorities;

2. the number of declassification authorities;

3. the number of original classification decisions, including the classification level of those decisions and the duration of classification;

4. the number of derivative classification decisions by classification level;

5. the number of requests received for mandatory review for declassification and agency actions in response to these requests in terms of cases, documents, and pages;

6. the number of pages of national security information reviewed during the year under systematic declassification procedures and the number declassified;

7. the number of formal self-inspections conducted by the agency; and

8. the number of security infractions detected by the agency within its own program.

The statistical data reported by each agency for FY 1983 covered a fourteen month period from August 1, 1982 through September 30, 1983. ISOO selected this period to commence with the effective date of E.O. 12356 and to conclude at the end of FY 1983. In order to facilitate the comparison of the FY 1983 statistics with those of prior years, ISOO reduced the reported fourteen month figures by 14.3% for those data ordinarily reported on an annual basis.

Continued Reduction in Original Classification Authorities

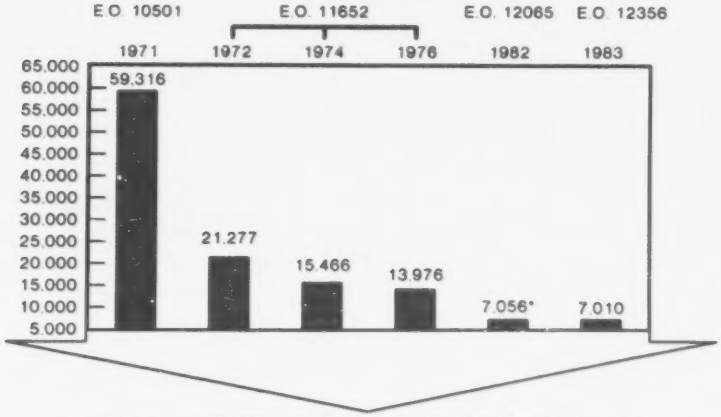
(Exhibits 1 and 2)

An "original classification authority" is an individual who is specifically authorized in the first instance to classify information in the interest of national security. These classifiers are designated in writing, either by the President or by other officials, mostly agency heads, named by the President. ISOO continually stresses the importance of limiting the number of original classifiers to the minimum required by operational needs, which, in turn, helps to control the volume of classification activity.

Since 1972, executive branch agencies have reduced the total number of original classification authorities from 59,316 to 7,010, almost a 90% reduction. This trend continued in FY 1983, with a further reduction of 46 original classifiers from FY 1982. Although this amounts to only a .7% decrease, it is especially notable that the decrease in the number of original classifiers has continued under E.O. 12356.

Exhibit 1

The Reduction in Original Classifiers 1971-1983



*Totals reported in FY 1982 ISOO Report changed to reflect addition of 113 "Secret" classifiers in AID and nine "Confidential" classifiers in OPIC not previously reported to ISOO

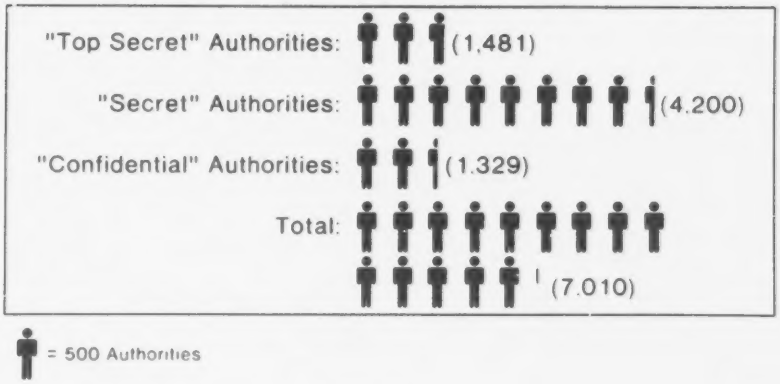
Despite the overall reduction, the number of "Top Secret" and "Secret" original classifiers increased very slightly in FY 1983: "Top Secret" classifiers by 16 (1%); and "Secret" classifiers by 14 (.3%). These increases are too slight to be considered a trend, but ISOO will pay special attention to the several agencies that account for them.

ISOO believes that further reductions in the number of original classifiers are attainable. ISOO's program reviews and analysis of data reveal some disparity in the concentration of original classifiers among agencies with comparable classification activity. In FY 1984, ISOO will seek further reductions in those agencies that appear to have more original classifiers than are necessary.

Three activities merit particular credit for significantly reducing the number of original classifiers in FY 1983. These are ACDA, by 40 (-45%); DoE, by 42 (-20%); and CEA, by 3 (-75%).

Exhibit 2

Number of Original Classifiers

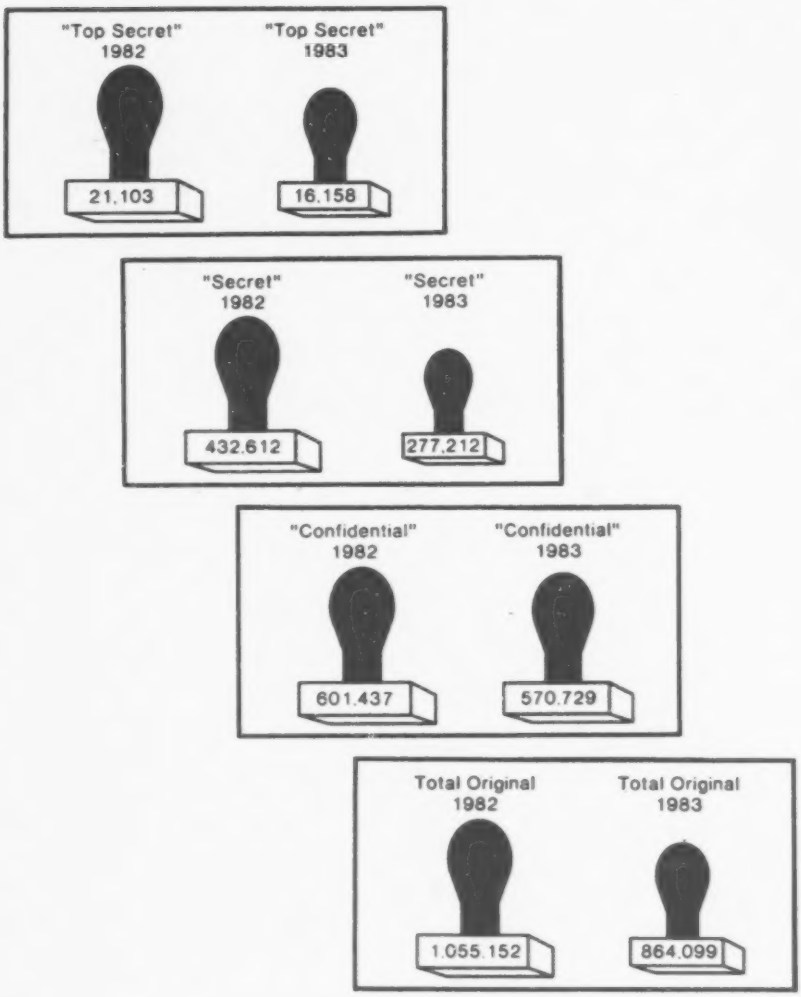


Original Classification Decreases Significantly

(Exhibits 3-6)

An "original classification decision" is an initial determination by an authorized official that information requires protection from unauthorized disclosure in the interest of national security. This determination is accompanied by the placement of required national security markings on the medium that contains the information. Because of the current and future impact that original classification decisions have on every aspect of the information security program, their number is probably the most significant statistic that ISOO reports annually.

Exhibit 3
Original Classification Decisions

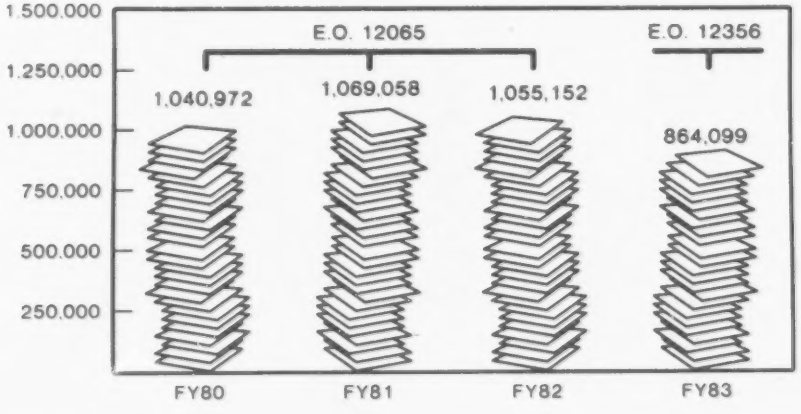


FY 1983, the first year of E.O. 12356's operation, witnessed an extraordinary reduction in the number of original classification decisions. The 864,099 original classification decisions constituted almost 200,000 fewer actions than in FY 1982. This amounts to an 18% reduction in a figure that had remained largely constant throughout E.O. 12065's existence. Even more impressive were the reductions in the number of original classification decisions at the higher levels, "Top Secret" and "Secret". "Top Secret" decisions were down by 4,945, a reduction of 24%, and "Secret" decisions were down by 155,400, a reduction of 36%.

In FY 1983, "Top Secret" determinations accounted for 2% of the original classification decisions, "Secret" accounted for 32%, and "Confidential" accounted for the remaining 66%. In FY 1982, the breakdown was "Top Secret", 2%; "Secret", 41%; and "Confidential", 57%. Therefore, in addition to the decrease in the total number of original classification decisions, the lowest classification level, "Confidential", accounted for a significantly higher percentage of those decisions in FY 1983.

Exhibit 4

Comparison of Original Classification Activity



Consistent with prior years, four agencies originally classified over 99% of all such actions within the executive branch in FY 1983: DoD, 36.08%; CIA, 26.63%; State, 20.92%; and Justice, 15.5%. All other executive branch departments, agencies and offices originally classified information on less than 7,500 occasions (.87%). Of the four major classifiers, the CIA reduced its number of original classification decisions by an extraordinary 44%, and Justice was down by almost 18%. Original classification increased somewhat at DoD (6.8%) and State (1.7%). Other agencies active in the security classification program that experienced significant decreases in the number of original classification decisions included NSC (-60%); ACDA (-40%); FEMA (-15%); NASA (-82%); DoE (-13%); NRC (-28%); OMSN (-60%); and USIA (-59%).

Exhibit 5

FY 1983 Original Classification Decisions by Agency

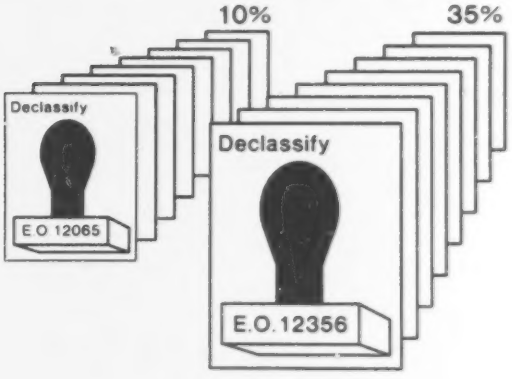
Agency	Original Decisions	% Assigned Date or Event for Declassification	% OADR (Must Be Reviewed before Declassification)	% "TS"	% "S"	% "C"
DoD	311,795	71%	29%	1%	18%	81%
CIA	230,123	13%	87%	4%	31%	65%
State	180,809	28%	72%	0%	21%	79%
Justice	133,882	0%	100%	1%	82%	17%
FEMA	1,937	14%	86%	27%	44%	29%
Treasury	1,562	54%	46%	1%	5%	94%
NSC	1,197	0%	100%	27%	54%	19%
DoE	795	22%	78%	1%	52%	47%
All Others	1,999	50%	50%	2%	19%	79%

Another outstanding accomplishment relating to original classification in FY 1983 was the fact that 35% of the actions specified automatic declassification upon the passage of a specific date or event. This number represents a significant improvement from the experience under E.O. 12065,

when, in ISOO's estimation, over 90% of all original classification decisions required agency review before the information could be declassified. This higher ratio of actions scheduled for declassification without review will greatly facilitate the declassification process and increase the declassified product in the future. DoD, with a rate of 71%, and Treasury, with a rate of 54%, merit special recognition.

Exhibit 6

Original Classification Decisions Scheduled for Automatic Declassification



Derivative Classification Increases Slightly

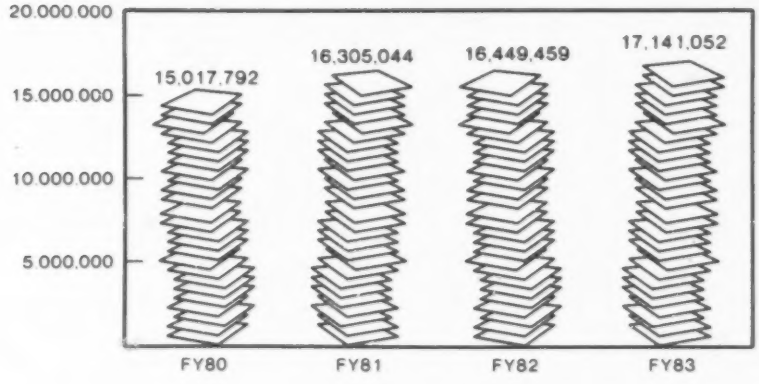
(Exhibits 7 and 8)

Derivative classification is the act of incorporating, paraphrasing, restating or generating in new form classified source information. Information may be derivatively classified in two ways: (a) through the use of a source document, usually correspondence or publications generated by an original classification authority; or (b) through the use of a classification guide. Only executive branch or government contractor employees with the appropriate security clearance who are required by their work to restate classified source information may classify derivatively.

During FY 1983, executive branch agencies made 17,141,052 derivative classification decisions, a 4% increase over FY 1982. Some of this increase in derivative classification can be attributed to the efforts made by ISOO and others to encourage the development and use of classification guides. These guides, issued by original classification authorities, identify information to be classified in the interest of national security, and prescribe the level and duration of classification for each identified item of information. The use of classification guides promotes uniformity throughout the executive branch in the classification and declassification of like information.

Exhibit 7

Comparison of Derivative Classification Activity



Of the total derivative classification decisions made in FY 1983, 522,528 (3%) were classified at the "Top Secret" level, 5,090,280 (30%) at the "Secret" level, and 11,528,244 (67%) at the "Confidential" level. These percentages coincide exactly with those in FY 1982.

Another coincidence is that the DoD (85.53%) and the CIA (14.11%) accounted for 99.64% of all derivative classification activity in FY 1983, the exact percentage of their total in FY 1982. For FY 1983, DoD derivative actions increased by 6.7%, while CIA derivative actions decreased by 9%. All other agencies derivatively classified only 61,000 actions during FY 1983. Other significant percentage reductions in the number of derivative classification actions achieved in FY 1983 as compared with FY 1982 included the NSC (-88%); DoT (-49%); OVP (-37%); FEMA (-22%); GSA (-30%); OSTP (-85%); Commerce (-22%); USDA (-13%); and NRC (-48%).

Exhibit 8

FY 1983 Derivative Classification Actions by Agency

Agency	Total Derivative Actions	%"TS"	%"S"	%"C"
DoD	14,661,349	2%	21%	77%
CIA	2,418,699	7%	80%	13%
Justice	25,714	1%	97%	2%
DoE	16,917	0%	9%	91%
NASA	4,090	0%	98%	2%
FEMA	3,414	8%	65%	27%
Treasury	2,726	0%	46%	54%
All Others	8,143	19%	31%	50%

Classification Activity Remains Steady

(Exhibits 9 and 10)

The total number of original and derivative classification decisions made by executive branch agencies during FY 1983 was 18,005,151. This was approximately 500,000 more than FY 1982, a 2.8% increase that compares favorably with the modest increases of the past several years.

Statistics show that during FY 1983, 3% of all classification decisions were classified at the "Top Secret" level, 30% at the "Secret" level, and 67% at the "Confidential" level. This is essentially the same ratio reported for FY 1982. Two agencies accounted for 97.87% of all classification activity in the executive branch during FY 1983: DoD, 83.16%, and the CIA, 14.71%. All other agencies accounted for 383,185 classification actions during the year, a 6.4% decrease from FY 1982.

Exhibit 9

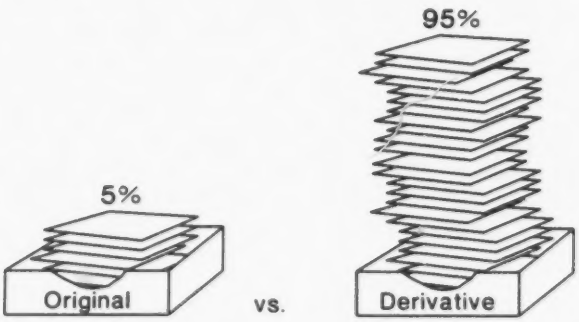
Comparison of Combined Classification Activity

FY	Total Actions	%"TS"	%"S"	%"C"
1980	16,058,764	3%	29%	68%
1981	17,374,102	5%	29%	66%
1982	17,504,611	3%	31%	66%
1983	18,005,151	3%	30%	67%
Change:				
FY '80-'81	+1,315,338 (+8%)	+2%	0%	-2%
FY '81-'82	+ 130,509 (+1%)	-2%	+2%	0%
FY '82-'83	+ 500,540 (+3%)	0%	-1%	+1%

During FY 1983, the ratio of original to derivative classification actions remained consistent with that reported for previous years. Original classification constituted 5% of all classifications, and derivative 95%. The consistency of this ratio over the years reinforces the importance of FY 1983's significant decrease in original classification decisions. Ultimately, the average original classification decision will result in a total of 20 classification actions. Therefore, ISOO believes that continued reductions in original classification decisions will eventually result in decreased derivative classification.

Exhibit 10

Original vs. Derivative Classification



Mandatory Review Levels Off

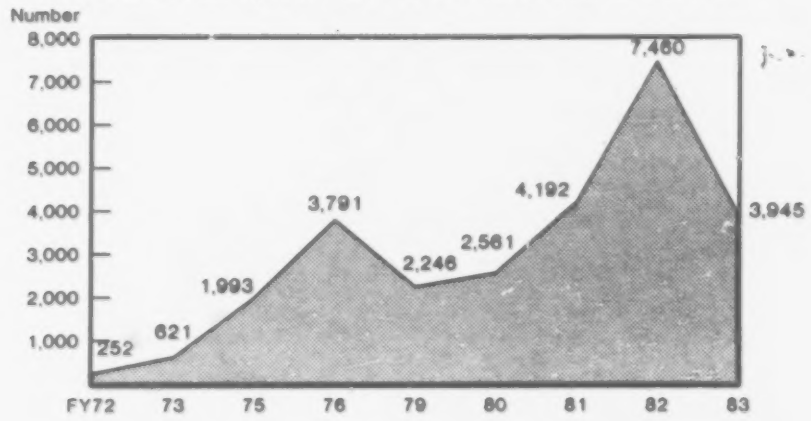
(Exhibits 11-14)

Executive Order 12356 continues the program known as mandatory review for declassification. Mandatory review provides that agencies or citizens, through written requests, may require an agency to review specified national security information for the purpose of seeking its declassification. These requests, which may be submitted at any time during the life of the information, are popular with researchers as a non-adversarial alternative to Freedom of Information Act requests.

Following a peak year of new requests in FY 1982, the number of mandatory review requests received in FY 1983 was 3,945, a total within the range of those reported in the years immediately preceding FY 1982. Added to the 3,894 cases carried forward from FY 1982, agencies had a mandatory review request workload of 7,939 cases in FY 1983. Of these, the agencies processed 3,610, or 46% of the total. While this percentage is fairly consistent with the processing rate in previous years, ISOO will seek increased agency efforts to reduce the inventory of pending cases in FY 1984.

Exhibit 11

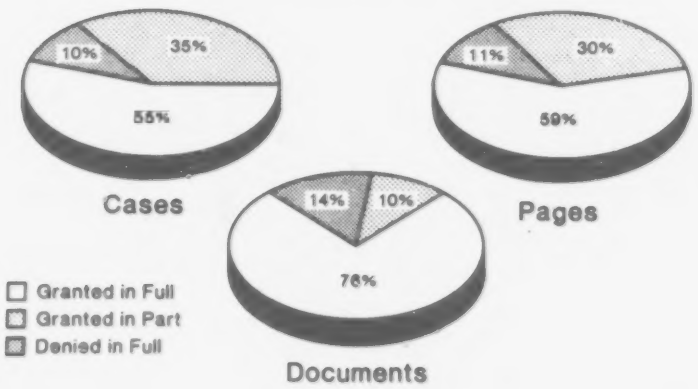
Mandatory Review Requests Received



For FY 1983, ISOO collected data on agency actions in response to mandatory review requests in terms of three separate reporting units: cases, documents and pages. Previously, ISOO had only collected these data in terms of cases. By looking at mandatory review actions in terms of documents and pages as well, ISOO hopes to present a clearer picture of the final product.

Exhibit 12

Mandatory Review Actions



Of the 3,610 cases processed in FY 1983, 1,980 (54.8%) were granted in full, 1,277 (35.4%) were granted in part, and 353 (9.8%) were denied in full. FY 1983 marks the first time that the rate of denials in full has fallen below 10%.

These 3,610 cases comprised 29,464 documents or 174,013 pages of classified information. Of the 29,464 documents, 22,318 (75.7%) were declassified in full, 3,078 (10.5%) were declassified in part, and 4,068 (13.8%) remained fully classified. Although comparisons with previous years are unavailable, that over 75% of the documents were fully declassified is very commendable.

Of the 174,013 pages, 102,695 (59%) were declassified in full, 51,543 (29.6%) were declassified in part, and 19,775 (11.4%) remained fully classified. Again without prior year comparisons, the fact that 88.6% of all pages reviewed were declassified in whole or in part reveals an excellent commitment to declassification on the part of the reviewing agencies.

Exhibit 13

FY 1983 Mandatory Review Actions by Agency

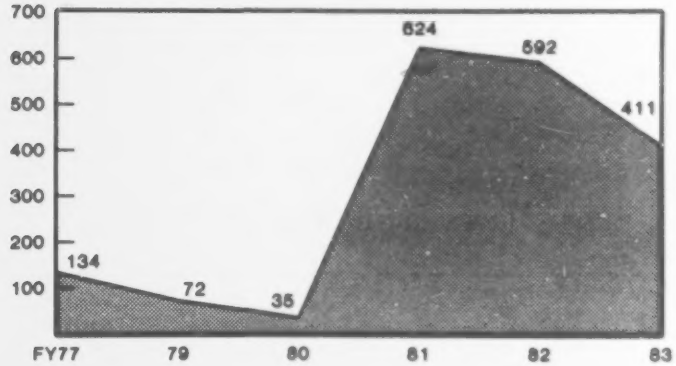
Agency	Total Cases Acted On	% Granted In Full	% Granted In Part	% Denied In Full
State	853	47%	45%	8%
DoD	781	62%	27%	11%
NSC	652	47%	49%	4%
Justice	525	75%	15%	10%
GSA (including NARS)	354	45%	40%	15%
CIA	186	28%	48%	24%
All Others	259	73%	18%	9%

E.O. 12356 also provides that agencies or members of the public may appeal mandatory review denials to designated officials of the denying agencies, or, in the case of classified presidential papers or records, to the Director of ISOO. During FY 1983, these agencies received 411 new appeals in addition to 759 appeals carried over from the previous year. Of these 1,170 pending appeals, the agencies processed 363 (31%) in FY 1983. This marks a significant increase in the number of unprocessed appeals carried over into the next year. ISOO will strongly encourage the concerned agencies to reduce this backlog as quickly as possible.

Of the 363 appeals processed, 59 (16.3%) were granted in full, 115 (31.7%) were granted in part, and 189 (52%) were denied in full. These 363 actions comprised 4,441 documents or 14,815 pages. Of the 4,441 documents reviewed, 679 (15.3%) were declassified in full, 1,533 (34.5%) were declassified in part, and 2,229 (50.2%) remained fully classified. Of the 14,815 pages reviewed, 2,047 (13.8%) were declassified in full, 4,849 (32.7%) were declassified in part, and 7,919 (53.5%) remained fully classified.

Exhibit 14

Mandatory Review Appeals Received



Systematic Review Continues to Decline

(Exhibits 15-17)

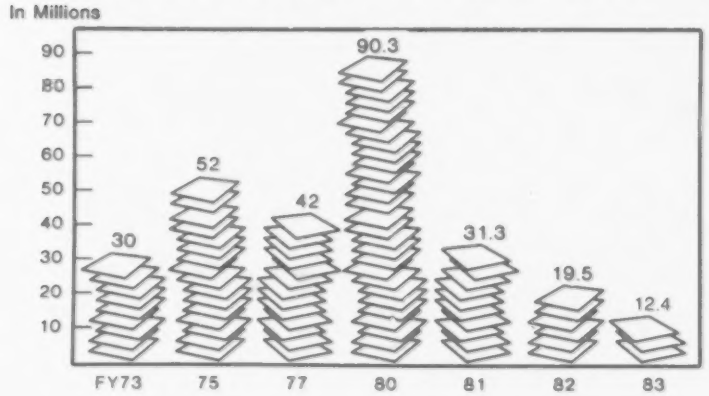
"Systematic review for declassification" is the program, first introduced in 1972, in which classified, permanently valuable (archival) records are reviewed for purposes of declassification after the records reach a specific age. Under E.O. 12356, the National Archives and Records Service (NARS) is required to conduct a systematic review of its classified holdings as they become 30 years old, except for certain intelligence or cryptologic file series which are to be reviewed as they become 50 years old. While other agencies are not required to conduct a systematic review program, they are encouraged to do so if resources are available.

In recent years, the product of the systematic review program has declined as a result of two factors. First, the records that are now being reviewed are not generally susceptible to the bulk declassification methods that were frequently adequate in declassifying World War II era records. Second, the resources available for systematic review have continued to dwindle.

This trend continued in FY 1983. Agencies systematically reviewed 12,407,523 pages of national security information in FY 1983, of which they declassified 7,848,295 pages (63%). The number of pages reviewed was 7,096,292 (36%) fewer than in FY 1982, and the rate of declassification decreased by 22%.

Exhibit 15

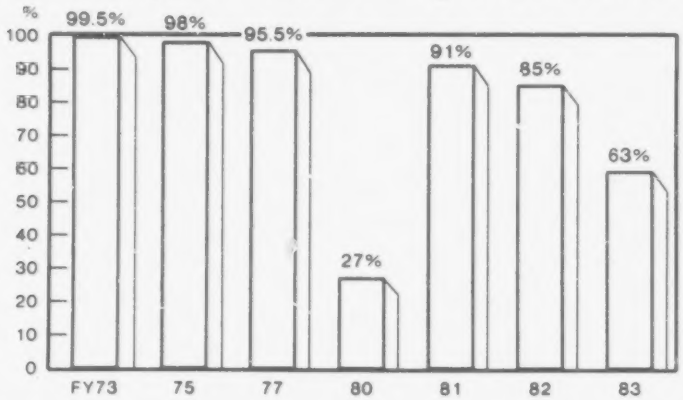
Pages Reviewed for Declassification



Despite these declines, it is encouraging to note that executive branch agencies other than NARS systematically reviewed nearly ten million pages for declassification during FY 1983, even though they were no longer required to conduct a systematic review program. This represented over 77% of the total pages reviewed in the executive branch during FY 1983. Particularly noteworthy were the efforts of DoD (9,278,640 pages); USIA (154,260 pages); State (106,791 pages); and AID (10,284 pages).

Exhibit 16

Percentage of Reviewed Pages Declassified



There was a clear disparity in the rate of declassification between NARS and other executive branch agencies, with the exception of State. NARS declassified almost 94% of the pages it reviewed. The other agencies declassified almost 54% of the pages they reviewed. Much of this discrepancy can be accounted for by differences in the age and subject areas of the records that were reviewed.

Exhibit 17

FY 1983 Systematic Review Actions by Agency

Agency	Pages Reviewed	Pages Declassified	% Declassified
DoD	9,278,640	5,013,079	54%
GSA/NARS	2,852,471	2,667,156	94%
USIA	154,260	64,275	42%
State	106,791	99,415	93%
All Others	15,361	4,370	28%

Critical to the future of systematic review is the ability of NARS to revitalize its program. The Assistant to the President for National Security Affairs has indicated his support for this effort and ISOO is currently working with NARS to seek the means of achieving this end.

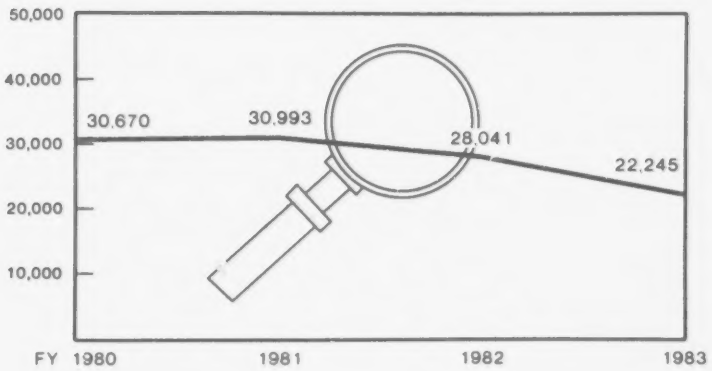
Agency Self-Inspections Decrease Again

(Exhibits 18 and 19)

While ISOO conducts an active program of agency inspections, its small size and budget dictate that the agencies assume most of this burden themselves. E.O. 12356 provides that agency heads administer "an active oversight and security education program." Agencies are required to inform ISOO of the number of self-inspections they perform each year.

Exhibit 18

Agency Self-Inspections



Agencies are also required to report to ISOO on the number and type of infractions detected during the year. An infraction is a minor violation of the Order, its implementing ISOO Directive or agency regulations. Infractions to be reported do not include the more serious violations that agencies are required to report to ISOO as they occur.

During FY 1983, executive branch agencies conducted 22,245 self-inspections to monitor or evaluate their own information security programs. This total represents a decrease of 5,796 (21%) from the number of inspections conducted in FY 1982, and 8,748 (28%) fewer than in FY 1981. Given the introduction of a new information security system in FY 1983, the continued decline in agency self-inspections was both unexpected and unfortunate. Agencies also reported a total of 18,344 infractions. This total is 1,935 (9.6%) fewer than the number of infractions reported for FY 1982. On an infraction per inspection basis, this indicates that agencies continue to detect less than one infraction per inspection, a rate far below that experienced by ISOO in its own review of the agencies' programs. These data call into question both the quality and quantity of agency inspection programs. ISOO will emphasize these apparent deficiencies in its oversight program for FY 1984.

Exhibit 19

Infractions

Infraction	Total FY 1980	Total FY 1981	Total FY 1982	Total FY 1983	% Change 82-83
Unauthorized Access	950	476	475	620	+31%
Mismarking	11,297	8,797	11,499	10,849	- 6%
Unauthorized Transmission	1,282	924	1,197	1,294	+ 8%
Improper Storage	3,975	3,341	4,222	3,844	- 9%
Unauthorized Reproduction	300	135	207	249	+20%
Overclassification	N/R	N/R	290	220	-24%
Underclassification	N/R	N/R	365	317	-13%
Classification w/o Authority	N/R	N/R	392	238	-39%
Improper Destruction	N/R	N/R	665	581	-13%

N/R = Statistics not reported for FY 1980 and FY 1981

A Narrative Look at FY 1983

Executive Order 12356 has been operational since August 1, 1982. Since that date, it has received extraordinary attention from persons and organizations inside and outside the executive branch of government. No one has scrutinized its performance more thoroughly, however, than the staff of the Information Security Oversight Office (ISOO). Based upon its observations and the data it has collected and analyzed, ISOO has reached a number of conclusions about the strengths and weaknesses of the program through its first full year of operation in FY 1983. These conclusions reveal that, on balance, the information security system under E.O. 12356 performed exceedingly well in FY 1983. The President's stated goal of achieving better protection for national security information without unwarranted classification is clearly being met.

FY 1983 Program Strengths: General

(a) Perhaps the most positive aspect of the first year's experience was the smooth transition from E.O. 12065 to E.O. 12356. ISOO cites two reasons. First, despite the great deal of publicity about the differences between the two systems, in ordinary day-to-day situations they are very similar. The types of information that were classified and declassified in August 1982 were the same as those that had been classified and declassified a month earlier. The only significant change in the marking of classified information was the use of "Originating Agency's Determination Required (OADR)," to indicate the duration of classification for information of indeterminable national security sensitivity at the time of classification. Safeguarding procedures remained virtually unchanged.

The other contributing factor was the concerted effort of senior program officials throughout the executive branch to achieve a smooth transition. ISOO, with a small staff and budget, must rely upon the active assistance of agency heads and their senior managers to oversee individual information security programs. The same persons who were instrumental in the development and issuance of E.O. 12356 were also deeply involved in its implementation. In the four months between E.O. 12356's issuance and effective dates, these officials began preparations for the transition by updating directives and procedures, and by revising, increasing and publicizing training opportunities for employees. Most importantly, these officials were knowledgeable about the prospective changes in the information security system, and could respond effectively to the myriad of questions that arose.

(b) The concern and involvement of senior program officials also contributed to a second positive feature of E.O. 12356's first year: the absence of any incident of serious executive branch abuse of the information security system. In ISOO's experience, classifiers and declassifiers almost always act in a good faith effort to comply with the requirements of the system, even if, on hindsight, a relatively small percentage of information is misclassified. As in any other program of comparable size, during the course of almost any year a few obvious abuses come to light. Executive branch officials were particularly sensitive to potential abuses in FY 1983. Their vigilance paid dividends. Despite unprecedented scrutiny by persons seeking incidents to publicize, in ISOO's view no serious abuse surfaced during E.O. 12356's first full year. The oversight and responsiveness of senior program officials prevented any serious problems.

(c) Another positive feature of E.O. 12356's first year was the steady realization of the purposes behind the revisions to E.O. 12065. (ISOO has expressed its views on these purposes in its essay, "The Background of Executive Order 12356," which is an appendix to its FY 1982 Annual Report to the President.) Program managers exercised greater flexibility in their administration of the information security system. The courts quickly adapted to the Order's provisions and the burden of litigating under the Freedom of Information Act began to abate. Perhaps most important, we began to hear representatives of our allies informally express greater confidence in our revised information security system. This portends less hesitation to share sensitive information with us.

FY 1983 Program Weaknesses: General

(a) Perhaps the most troubling of ISOO's observations during FY 1983 was the initial indifference among persons at the operating level about the introduction of a revised information security system. ISOO attributes this largely to an understandable sense of frustration at working under the fourth Executive order on national security information within a decade. This indifference, however, is not dissimilar to that experienced with the introduction of E.O. 12065, and, as evidenced in ISOO's most recent program reviews, appears to be dissipating.

(b) Despite an unprecedented effort to "get the word out" to operating personnel about E.O. 12356, too many persons who work with classified information remained unfamiliar with its requirements in FY 1983. Inaccurate media accounts of the Order and the indifference cited above aggravated this

situation. As a result, ISOO noted too many minor infractions during its FY 1983 inspections and program reviews, especially in the application of markings and safeguarding. Again, these problems are similar to those experienced during the first year of E.O. 12065's operations, and there should be marked improvement in the near future.

(c) Of the marking violations that ISOO noted in FY 1983, two types were especially troublesome. The first concerned the lack of portion marking. E.O. 12356 requires that all classified documents be portion marked to indicate which portions are classified and the level of classification. Agency heads may grant waivers of the portion marking requirement, which must be reported to the Director of ISOO. ISOO Directive No. 1 establishes certain guidelines for agencies to follow in considering portion marking waivers. Basically, these guidelines suggest that portion markings are highly recommended for information that is transmitted outside the originating office or for information that serves as a potential source for derivative classification. The waivers ISOO received comply with these guidelines. In practice, however, especially in the first six months of E.O. 12356's operation, ISOO took note of a number of documents without portion markings that had been transmitted outside the originating office and/or served as the sources for subsequent derivative classification. These examples were concentrated in a few agencies. ISOO expressed its concern to the senior program officials of these agencies, and in the last months of the fiscal year uncovered far fewer examples of these documents.

The second area pertained to the overuse during the first half year or so of E.O. 12356's operation of "Originating Agency's Determination Required" or "OADR" as a marking instruction for the duration of classification. While ISOO's experience has been that the duration of national security sensitivity cannot be determined at the time of classification for most information, there is some information that is clearly time-sensitive. Following Executive Order 12356's effective date, ISOO staff members noted a number of documents marked "OADR" that appeared to be sensitive only until a specific date or event. In several cases there seemed to be rote application of the indefinite time frame. On March 28, 1983, the Director of ISOO addressed a letter to the senior program official of each agency that creates or handles national security information expressing his concern about this problem. Agencies were directed to instruct original classifiers on the appropriate use of the "OADR" marking, and the responsibility to attempt to determine a specific date or event for declassification. As borne out in ISOO's later program reviews and the data ISOO collected at the end of FY 1983, there was a very large increase in the

number of classified documents marked with a specific date or event during the last half of FY 1983.

(d) Some agencies failed to issue completed internal regulations on E.O. 12356 by the end of FY 1983, even though they were due by December 31, 1982. These agencies have relied in the interim on patchwork versions of prior regulations, supplemented by ad hoc temporary instructions. To ISOO's knowledge, these delays have not resulted in any serious abuses of the information security system, but they have promoted the already noted problem of unfamiliarity with its requirements.

FY 1983 Program Strengths: Statistical

(a) The most important quantitative measurement of the information security system is the annual tally of original classification decisions. These decisions bear on almost all of the other components of the information security program, including derivative classification, declassification, safeguarding and marking. Therefore, FY 1983's unprecedented decrease in the number of original classification decisions is an outstanding achievement. The reduction is especially significant because, in ISOO's judgment, in FY 1983 it was almost entirely attributable to systemic factors, rather than to any changes in world events that would tend to decrease the number of classification decisions. These systemic factors include controlling the number of original classification authorities, developing classification guides, and maintaining strong oversight of the program.

Accentuating the decreased classification, almost all of the decline was in the higher classification levels, "Top Secret" and "Secret". These reductions follow ISOO's expressed concerns about increasing "Top Secret" classifications in FY 1982 under E.O. 12065. By reducing classification levels, agencies also reduce the costs of protecting the information.

(b) Almost as significant an achievement as the reduction in original classification is the 35% rate for documents marked with a specific date or event for automatic declassification. There is a large measure of irony in comparing this figure with the results under E.O. 12065. This prior Order mandated automatic declassification at the arbitrary date of six years from the information's creation, but left a couple of loopholes for exceptions. In ISOO's estimation, these "exceptions" accounted for 90% or more of the classification decisions under E.O. 12065, making six-year automatic declassification the actual exception.

Under E.O. 12356, there is no arbitrary time frame for automatic declassification. Instead, classifiers are required to set a particular date or event for declassification but only when it is feasible to do so based upon the anticipated duration of national security sensitivity. Nevertheless, in FY 1983, they achieved a rate of automatic declassification determinations three and one-half times higher than that realized under the system that attempted to mandate automatic declassification.

(c) With the onset of E.O. 12356, agency heads named by the President were required to redesignate their original classification authorities. Given the expressed concerns of providing increased protection for national security information, the number of original classification authorities might have been expected to rise significantly. Instead, agency heads exercised praiseworthy restraint by continuing the trend that began with the issuance of E.O. 11652 in 1972, to reduce the number of original classifiers.

ISOO considers the continuing decline in original classifiers to be a very positive statistic. First, limiting the number of original classifiers is perhaps the most important systemic control on the quantity of original classification. Second, these limitations help assure greater consistency and accountability in classification actions.

(d) The statistics on declassification in response to mandatory review requests demonstrate that, by and large, the agencies continue to strive for optimal public access to formerly classified information. Although a relatively small percentage of information is overclassified at its inception, the impact of overclassification is usually not a serious problem in the absence of any public access interest. In ISOO's experience, declassification reviews, in response to mandatory review requests or otherwise, almost always close the gap between what information needs to be classified and what information is classified. The executive branch's record of positive responses to public requests for declassification has been impressive over the years. FY 1983's effort was probably the best in terms of the percentage of information declassified and made available for public research.

FY 1983 Program Weaknesses: Statistical

(a) The systematic review for declassification program continued to deteriorate in FY 1983, and remains the area of greatest concern in measuring the state of the information

security system. This program, in which classified, permanently valuable records are reviewed for purposes of declassification as they become 30 years old (50 years for certain intelligence and cryptologic file series), began its decline under E.O. 12065 several years ago. The drafters of Executive Order 12356 hoped to reverse the downward trend by reinstating the very successful systematic review framework of E.O. 11652, i.e., requiring systematic review only in the National Archives and Records Service (NARS), encouraging voluntary systematic review programs in the other agencies, and reestablishing the 30-year time frame for review.

Unfortunately, these changes cannot counter the two non-systemic factors that have impeded systematic review in recent years. The first is the change in the prevalent subject areas of the records now ripe for review. Unlike World War II era records, which in many instances were well suited to bulk declassification methods, the records now being reviewed usually require line-by-line consideration. Second, the resources available for systematic review at NARS have fallen dramatically, the result of both redefined agency priorities and overall budget cuts.

The vitality of systematic review for declassification ultimately depends upon a strong program at NARS. ISOO believes that a revitalized program at NARS merits government-wide support. Following up on the expressed concern of the Assistant to the President for National Security Affairs, ISOO is working with NARS to seek solutions to the current problems. These may include not only increased resources, but also improved procedures for selecting and reviewing classified records. By the time of its FY 1984 Report, ISOO hopes to report significant progress toward reversing the downward trend in systematic review.

(b) ISOO remains concerned about both the number and quality of agency self-inspections. With the institution of a new information security system in FY 1983, ISOO anticipated a significant increase in the number of self-inspections as an important function of each agency's oversight responsibilities. Instead, the number of self-inspections declined.

The number of reported infractions also declined, maintaining a ratio of less than one infraction detected for each agency self-inspection. From ISOO's own inspection experience, this low rate of detected infractions calls into question the quality of agency inspections. Even those agencies with outstanding information security programs incur a limited number of minor infractions.

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Perhaps the most important reason that the information security system performs effectively is the extent of internal and external oversight. Inspections are a major component of oversight. ISOO will be prodding agencies to increase the number of their self-inspections, and to assure that these inspections meaningfully examine the status of their information security programs.

(c) Although the agencies are declassifying information in response to mandatory review actions at a very impressive rate, they are falling behind somewhat in their backlogs of both requests and appeals. Too many cases remain unresolved at the end of each fiscal year. The attendant delays strain the patience of researchers, whom the agencies should appreciate for selecting mandatory review actions over more adversarial alternatives.

The number of new mandatory review requests and appeals fell in FY 1983. If these levels remain stable or decrease in FY 1984, agencies must be held accountable for reducing their mandatory review backlogs.

Conclusion

The first full year of E.O. 12356's operation attracted unparalleled attention to the executive branch's information security system. Never before has this vital program been more exposed to criticism. Its harshest critics hungrily awaited for their predictions of rampant overclassification and other abuses to come true. Largely ignored went the statements of the President and others responsible for the program that E.O. 12356's purpose was to improve the protection of only that very small quantity of information that merited it, and not to expand upon the classified universe.

ISOO takes special delight, therefore, in reporting that for FY 1983, E.O. 12356 and the information security system operating under it were outstanding successes. The transition went smoothly, the abuses never materialized, and the agencies achieved greater protection for national security while originating significantly less classified information. In a very short time, the Order has fostered a much improved information security system. ISOO looks forward to even greater progress in FY 1984 and beyond.

APPENDIX

THE BACKGROUND OF EXECUTIVE ORDER 12356

INTRODUCTION

On December 1, 1978, Executive Order 12065, "National Security Information," took effect. Less than four years later, Executive Order 12356 replaced it. What hastened the change? The Information Security Oversight Office (ISOO), charged with overseeing the government-wide information security program under both Executive orders, concludes that the authors of E.O. 12065, in an effort to emphasize the principle of open access to information, included language that sometimes undermined its effectiveness as an information security system.

This is not to say that E.O. 12065 was a failure. As this Report and ISOO's prior Reports to the President illuminate, the Government's information security program was reasonably successful under E.O. 12065. Many of its provisions, most notably those that limited the number of original classifiers and those that required effective training and oversight, have had a very positive impact on the information security program, and are retained or even strengthened in E.O. 12356. As a matter of fact, E.O. 12356 more closely resembles E.O. 12065 than it does any prior information security system.

Retaining its predecessor's successful features, E.O. 12356 abandons or adjusts those aspects of E.O. 12065 that proved to be inefficient, inflexible or counterproductive. Without describing each and every change, ISOO groups the shortcomings of E.O. 12065 into the following categories: (a) its inefficient program for the systematic declassification review of information; (b) its inflexible administrative requirements; (c) its negative tone; (d) its adverse impact on litigation; and (e) its unrealistic program for automatic declassification. In the discussion that follows, ISOO examines each of these problem areas in greater detail, and notes the changes in E.O. 12356 designed to remedy them. They are discussed in the order that each problem arose as a matter to be addressed in the process of constructing E.O. 12356.

THE SYSTEMATIC REVIEW PROGRAM

In 1972, Executive Order 11652 introduced the program of systematic review for declassification. It was designed to promote the expeditious, inexpensive and wholesale declassification of the massive volume of permanently valuable classified records in the National Archives of the United States that dated from World War II and its aftermath. The Order provided that the Archivist of the United States would conduct a systematic review of the Archives' classified holdings as they became 30 years old.

The systematic review program under E.O. 11652 was a tremendous success. Between 1972 and 1978, the National Archives declassified over 100 million pages of previously classified records. In retrospect, much of the success of the systematic review program at that time was due to the nature of the records being reviewed, most of which related to military operations or emergency planning, and the high priority given the program in the National Archives. Looking at the success of the systematic review program, the drafters of E.O. 12065 decided to take it a few steps farther. E.O. 12065 directed all agencies, not just the National Archives, to conduct a systematic review program, and lowered the applicable age of records to be reviewed from 30 to 20 years. Agencies were further directed to reduce their backlog of permanently valuable classified records in order to complete the transition to 20-year review no later than December 1, 1988.

From its earliest stages of implementation, the revised system faced obstacles, especially in those large classifying agencies that had never conducted their own systematic review programs. They had to divert money from mission related programs to fund new systematic review units. Frequently, the personnel in these units were performing a function that was both new to them and largely unrelated to their previous experience.

The shift to 20-year review created even greater problems. Several factors came into play that sharply reduced the percentage of records that could be declassified as a result of systematic review. First, the general subject areas of the post-War records related more to "Cold War" issues than to military operations and emergency planning. Much more information, frequently involving intelligence activities, remained sensitive. This required item-by-item review, rather than the bulk declassification that spurred the program under E.O. 11652. Second, experience revealed that the national security sensitivity of a significant percentage of information lingers after 20 years, but often dissipates around 30 years. Speculation ties this phenomenon to the fact that the 30-year period more accurately reflects the span of political or public careers. It is worth noting that the Federal Records Act contains a 30-year rule for specific agency restrictions on access to records in the National Archives and a number of foreign democracies restrict access to their records for the same time period. Finally, the 10-year reduction vastly increased the volume of information subject to review, exaggerated by the tremendous growth of the Federal Government during and immediately after the War. Rather than absorbing the backlog, most agencies had made little, if any, progress from the 30-year mark by the August 1982 effective date of E.O. 12356.

In June 1980, the General Accounting Office (GAO), working at the behest of the House Subcommittee on Government Information and Individual Rights, asked ISOO and several other executive branch agencies to review and comment on a draft report entitled, "Systematic Review for Declassification -- Do Benefits Equal Cost?" The draft report answered its title, "No," and went so far as to recommend an amendment to E.O. 12065 to abolish the systematic review program. The draft report stated that agencies could meet researcher demands by relying exclusively upon individual access requests under the Freedom of Information Act or the mandatory review provisions of E.O. 12065.

To coordinate a reply to the draft report, the ISOO Director convened a meeting of the Interagency Information Security Committee, composed of representatives of the major classifying agencies. At the meeting there was almost total agreement that the GAO draft correctly pointed out a number of deficiencies in E.O. 12065's systematic review program. (The meeting also featured the first formal expression of other problems with E.O. 12065 by several agency representatives.) The representatives took sharp issue, however, with the draft report's recommendation to abolish the program entirely. There was a consensus that Freedom of Information and mandatory review requests could never adequately substitute for the broader scale benefits of systematic review. ISOO, on behalf of the executive branch, strongly objected to GAO's draft recommendation, and stated that it would examine less drastic means of equating the tangible and intangible benefits of the systematic review program with its rising costs. The final GAO report took cognizance of the effort to preserve the systematic review program while lowering the costs; and ISOO's examination of the systematic review program played a major role in the changes that appeared in E.O. 12356.

The systematic review program of E.O. 12356, as implemented by ISOO Directive No. 1, resembles the successful program of E.O. 11652. Once again, only the Archivist of the United States is required to conduct a systematic review program for the declassification of records accessioned into the National Archives, and of presidential papers or records under the Archivist's control. The Directive schedules systematic review at the 30-year mark again, except that it establishes 50-year review for sensitive intelligence and cryptographic information. In addition, it requires the Archivist to establish priorities based upon the expected degree of researcher interest and the likelihood that review will result in significant declassification. While other agencies are not required to conduct systematic review for declassification of records in their custody, they are encouraged to do so if resources are available.

There is at least one area of the revised systematic review program that requires special scrutiny. By reducing and slowing down the program, E.O. 12356 potentially worsens a problem that has existed for some time, i.e., the buildup of permanently valuable classified records. This is especially true at a time when the National Archives has had to cut back on the resources it devotes to systematic review. A very positive program to counter this problem is the transfer of funds from a classifying agency to the National Archives so that it may

systematically review specified records of that agency at a cost far less than would otherwise be the case. The State Department and the National Archives currently participate quite successfully in such a project. The agencies and ISOO must also pay particular attention to other variables that may counteract the buildup of classified holdings. These include educating original classifiers with respect to determining the duration of classification based upon specific dates or events, and discouraging the use of the waiver authority vested in agency heads with respect to both portion marking and the issuance of classification guides. Both portion marking and classification guides tend to control the volume of classified information, especially that classified on a derivative basis.

On balance, E.O. 12356's systematic review program represents a reasonable compromise between the calls to abolish the program and the costly, inefficient system under E.O. 12065. When properly administered and funded, systematic review remains the most effective means of declassifying large quantities of those classified records in the National Archives that are in greatest demand by researchers.

ADMINISTRATIVE REQUIREMENTS

When the Interagency Information Security Committee met on June 19, 1980, to consider the draft GAO report on systematic review, the discussion turned to other provisions of E.O. 12065 that the representatives of the member agencies felt were unworkable or inadvisable. Most of their other complaints expressed that day could be grouped under the heading, "Administrative Headaches."

In drafting E.O. 12065, its authors designed stringent administrative controls as a means to restrain unwarranted classification. These controls sought to limit classification authority initially; to inhibit the delegation of classification authority; to minimize the extension of automatic declassification dates; to mandate portion marking; to require the promulgation of classification guides; to restrict the classification of information following the receipt of a Freedom of Information or mandatory review request; and to ban the reclassification of any information that had previously been declassified and disclosed.

By and large most of these measures had the desired effect and E.O. 12356 retains their positive features. In some situations, however, the degree of inflexibility drafted into these provisions created unnecessary and unreasonable impediments to an effective information security system. Notable among these were the provision limiting agency classification action to the agency head or deputy agency head following the receipt of a Freedom of Information or mandatory review request; the universal requirement for classification guides; the requirement that only an agency head or "Top Secret" classification authority could issue a classification guide; and the total ban on reclassification.

Section 1-606 of E.O. 12065 provided in pertinent part: "No document . . . may be classified after an agency has received a request for the document under the Freedom of Information Act or the Mandatory Review provisions of this Order . . . unless such classification . . . is authorized by the agency head or deputy agency head." The rationale for this limitation is laudable, and carries over into E.O. 12356. It seeks to prevent agencies from unjustifiably using the classification system to thwart the general policy expressed by the Freedom of Information Act and mandatory review. Inherent in the provision is the assumption that limiting classification action under these circumstances to the agency head or deputy agency head helps assure its legitimacy.

Unfortunately, there are several government agencies that receive numerous Freedom of Information and mandatory review requests for large quantities of older records, which, although safeguarded from disclosure, have never been previously marked as national security information. Faced with requests for access to thousands upon thousands of these documents, many of them clearly and routinely classifiable, the requirement that only the agency head or deputy agency head could classify them became an enormous burden on their valuable and limited time. E.O. 12356 rectifies this situation by adding the "senior agency official," designated by the agency head, and agency "Top Secret" original classifiers, of whom there are less than 1,500 government-wide, as persons who

may also classify information following the receipt of a Freedom of Information or mandatory review request. Because these individuals are by and large the same officials and policymakers who would be responding classification to the agency heads, it is reasonable to expect that they will classify information with the discretion and judgment that these special circumstances demand.

The provision of E.O. 12065 mandating the development and issuance of classification guides also created administrative problems in certain agencies. A classification guide is a document issued by an original classification authority that instructs derivative classifiers about the particular elements of information that must be classified, the level of classification and its duration. In most instances guides help assure uniform classification and otherwise facilitate the derivative classification process. In some areas, however, it is difficult and sometimes impossible to predetermine and describe particular elements of information that must be classified. This has proven to be especially true in the area of foreign relations. As a result, in some cases the cost of producing usable guides far exceeds their benefits in facilitating derivative classification. Therefore, E.O. 12356 permits an agency head to waive the requirement to produce classification guides when an evaluation of relevant factors spelled out in ISOO Directive No. 1 reveals that the cost of production would exceed the benefit to the derivative classification process. The agency head must report waivers to the Director of ISOO, who will review them as part of the oversight function.

Ironically, another provision of E.O. 12065 hindered the promulgation of classification guides by limiting the authority to issue them to agency heads or original "Top Secret" classification authorities (only the agency head in those agencies that may not classify originally at the "Top Secret" level). In many instances the program official most familiar with the subject matter of a particular guide is an authorized original classifier, but not at the "Top Secret" level. Therefore, E.O. 12356 facilitates the promulgation of classification guides by permitting their issuance by an official who has program or supervisory responsibility over the information and is authorized to classify information originally at the highest level of classification prescribed in the guide.

Another area of inflexible administration was E.O. 12065's blanket prohibition against the reclassification of information previously declassified and disclosed. Almost anyone would agree that in most instances it is useless and sometimes counterproductive to reclassify information once it has been declassified and disclosed. However, there are exceptions. During the time E.O. 12065 was in effect, situations arose in which information had been declassified erroneously and disclosed, but the information was reasonably recoverable from the recipient. Despite the fact that the damage to the national security could be minimized, the blanket prohibition prevented reclassification. Rather than closing the door to reclassification completely, E.O. 12356 provides that information previously declassified and disclosed, but which continues to meet the tests for classification, may be reclassified by an agency head if it is "reasonably recoverable." ISOO Directive No. 1 specifies those factors that an agency head must take into consideration before reclassifying information under this provision. In addition, each reclassification action must be reported to the Director of ISOO, who closely monitors its reasonableness. These special safeguards should help assure that this authority is not abused.

A MATTER OF TONE

The Intelligence Community played a significant role in the development of E.O. 12356. In fact, it was an interagency Intelligence Community committee that composed the first draft of a revised Order. The committee acted in response to a White House request that it examine ways of improving the nation's intelligence capabilities. The committee focused its efforts on the negative tone of E.O. 12065 and those provisions of the Order that adversely impacted upon the Government's litigating posture in defending Freedom of Information and other lawsuits.

The problem of E.O. 12065's negative tone refers to its unbalanced portrayal of the twin goals of openness and security. The exhortation to openness that permeated its language distorted the fundamental purpose of an information security system, i.e., the protection of national security information from unauthorized disclosure. By repeatedly expressing the classification process in

terms of "don'ts" rather than "dos," E.O. 12065 downplayed the critical importance of protecting our own sensitive information and the information given to the United States in confidence by foreign governments.

Given the tone of E.O. 12065's language, it is not surprising that foreign officials often expressed concern over the ability of this Government to protect shared information. They viewed the Order as an extension of the Freedom of Information Act. While these fears were largely unwarranted, this perception threatened to dry up actual and potential intelligence sources. The threat to the United States intelligence effort highlighted the need to state fundamental classification policy and procedures in language that recognized legitimate security requirements.

For example, Section 1-301 of E.O. 12065, which listed appropriate classification categories, began, "Information may not be considered for classification unless it concerns . . . ." Contrast Section 1.3(a) of E.O. 12356: "Information shall be considered for classification if it concerns . . . ." Similarly, Section 1-302 of E.O. 12065, which establishes the threshold damage test for classification, stated:

> Even though information is determined to concern one or more of the criteria in Section 1-301, it may not be classified unless an original classification authority also determines that its unauthorized disclosure reasonably could be expected to cause at least identifiable damage to the national security.

Contrast the positive statement of its revised ~~counterpart, Section 1.3~~(b) of E.O. 12356:

> Information that is determined to concern one or more of the categories in Section 1.3(a) shall be classified when an original classification authority also determines that its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security.

Perhaps the clearest example of E.O. 12065's negative tone was found in the so-called "reasonable doubt" standard. This is the provision that instructs original classifiers if they are uncertain about the need to classify information, or about the appropriate classification level. Ironically, these respective provisions, which the news media and others have repeatedly and inaccurately cited to distinguish the two Orders in an extraordinarily abbreviated fashion, are far more important in theory than in practice. For even though the original classification process sometimes involves difficult judgments, the senior status of original classifiers encompasses officials who routinely make difficult decisions in areas related to national security. Accordingly, actual cases of "reasonable doubt" are unusual.

E.O. 12065 required that all these cases be resolved in favor of no classification, when whether to classify or not was the issue, and in favor of the lower classification level, when the appropriate level was the issue. This is a simplistic and dangerous solution. Why mandate an answer for all cases when the merits of each situation will differ and there exist reasonable means of resolution? E.O. 12356 takes a more responsible stance, providing, in effect, "When in doubt, find out." It requires that the information be safeguarded as if it were classified, or at the higher level, pending a determination by an authorized classifier, which must be reached within thirty days. This is certainly a reasonable delay when matters of national security are concerned.

With these and other changes in tone, E.O. 12356 sounds like what it is, the framework for the executive branch's information security system. While recognizing the critical importance of openness in government generally, it does not apologize for those situations in which the national security requires secrecy.

THE IMPACT OF LITIGATION

Several agencies frequently must defend in court their efforts to protect national security information from disclosure under the Freedom of Information Act. Executive Order 12065 unintentionally but significantly increased the burden upon the Government in defending these actions.

Section 3-303 of E.O. 12065 provided: "It is presumed that information which continues to meet the classification requirements [of the Order] requires continued protection. In some cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified. . . ." This was the so-called "balancing test" of E.O. 12065.

For many months the drafters of E.O. 12065 debated the inclusion of a "balancing test." Proponents insisted that it was necessary to state explicitly that even properly classified records might be declassified for some greater public purpose than that served by their protection. Opponents, while recognizing the inherent need to balance the competing interests of protection and disclosure, warned against an explicit "balancing test" on the basis that it would create significant problems for the Government in defending Freedom of Information litigation. Ultimately, the proponents of a "balancing test" prevailed, on the assurance that the discretionary language quoted above would prevent its exploitation by plaintiffs in these lawsuits.

This forecast proved to be unequivocally wrong. The "balancing test" became, and in some holdover cases continues to be, the major litigating problem for the Government in actions involving E.O. 12065. Plaintiffs argued that the consideration of the "balancing test" by agency heads was mandatory, not discretionary, and challenged administrative determinations to keep information classified even when agency heads had applied the test. To defend these actions required the Government to prove not only the proper classification of information, but also the proper application of a "balancing" procedure. More ominous was the prospect that some judges would second-guess the agency heads, who were responsible under law for protecting the information, and who were knowledgeable about the consequences of disclosure. Finally, litigating the "balancing test" had the practical effect of requiring the defending agency to produce successive generations of supporting affidavits, increasing the details in each. This was not only burdensome, but it required the disclosure of more and more information about classified subjects, much of which was itself quite sensitive.

As in the case of the "balancing test," E.O. 12065's "identifiable" damage standard for "Confidential" classification is an example of good intentions leading to unexpected and undesirable consequences in the context of Freedom of Information litigation. The drafters of E.O. 12065 inserted the word "identifiable" to emphasize to classifiers the importance of conscious decision-making before classifying information. Instead, plaintiffs seized upon "identifiable" to argue that it mandated a qualitative or quantitative standard or degree of damage to national security before information could be classified. For example, in one lawsuit the plaintiff sought the release of certain information, which, if disclosed, would have revealed intelligence sources or methods. Plaintiff argued that it could not be classified, because the prospective damage to these sources or methods was merely speculative, and not presently "identifiable." Fortunately, the judge in this case recognized the absurdity of this logic. Nevertheless, the "identifiable" experience attests to the legal adage of avoiding unnecessary adjectives in drafting instruments subject to interpretation.

The drafters of E.O. 12356 agreed that the only realistic way to cope with these provisions adequately was to eliminate them. Less incisive action, e.g., alternative language, failed to exclude the possibility of persons continuing to litigate areas of administrative discretion.

The deletion of the "balancing test" should prove to be one of E.O. 12356's most important changes. Its absence should relieve much of the Government's unforeseen burden in defending Freedom of Information actions seeking access

to classified records. ISOO and the classifying agencies must be vigilant, however, to see that the absence of the "balancing test" and "identifiable" damage does not result in less thoughtful classification and declassification decisions. Classifiers and declassifiers must consider both sides of the issue. As with prior Executive orders, E.O. 12356 does not require the classifier to record contemporaneously the reasons behind the decision to classify or to keep information classified. Every classifier must be aware, however, that there are avenues to challenge the validity of classification, at which time the classifier is likely to be called upon to justify and explain the classification decision in writing, and frequently under oath.

AUTOMATIC DECLASSIFICATION

Executive Orders 10501, 11652, and 12065 all included some provision for the automatic declassification of national security information based solely upon the passage of a fixed number of years. E.O. 12065 carried the concept of automatic declassification farthest:

> Section 1-401. Except as permitted in Section 1-402, at the time of the original classification each classification authority shall set a date or event for automatic declassification no more than six years later.
>
> Section 1-402. Only officials with Top Secret classification authority and agency heads . . . may classify information for more than six years from the date of original classification. This authority shall be used sparingly. . . .

What sounds good in theory doesn't always work. As happened with prior Orders, classifiers honored the automatic declassification requirements of E.O. 12065 far more frequently in the breach than in the practice. They could not ignore a reality that confronts classifiers much of the time: It is difficult, if not impossible, to discern at the time of classification the duration of the information's sensitivity.

In theory, uncertain classifiers under E.O. 12065 had two alternatives: (a) they could disregard their concern about the duration of the information's sensitivity, and mark the information for automatic declassification in six years or less; or (b) they could bring the information before the head of the agency or a "Top Secret" classification authority, and seek to have that person classify it for a period of time not to exceed twenty years (for foreign government information, not to exceed thirty years). In practice, classifiers chose alternative (a) less than 10 percent of the time. They chose alternative (b), requiring special procedures and mandated for "sparing" use, approximately 65 percent of the time.

In practice, to handle the remaining 25-30 percent of original classification actions, the classifiers relied upon an invention that wasn't even contemplated in E.O. 12065, i.e., "Review in six years." In other words, the classifiers, unwilling to risk the automatic declassification of information that might continue to require protection after six years, but also unwilling or unable to go through the procedure to extend its classification up to twenty years, created a makeshift substitute for automatic declassification.

Even though "six year review" may have eased the consciences of classifiers, it was not a viable solution. First, agencies were already having a difficult time trying to comply with the requirement to review 20-year old permanently valuable classified information. It was ludicrous to expect that they would be able to devote the resources necessary to review a large portion of all their classified information within six years. Second, because E.O. 12065 did not contemplate a "six-year review," it was quite possible that the courts would find that information marked in this manner was automatically declassified after six years, and order its release despite its national security sensitivity.

Information properly marked for six-year automatic declassification presented a different problem. ISOO and agency reviewers uncovered a disturbing number of situations in which the automatic declassification provisions of E.O. 12065 led to the rote application of the six-year rule to information that would clearly require protection for a longer period. This phenomenon was not new with E.O. 12065, merely exaggerated. Any classification system that mandates an arbitrary period of time for the duration of protection must presuppose some degree of premature disclosure and consequential damage to the national security.

E.O. 12065's system for automatic declassification was clearly one of its greatest failings. Over 90 percent of reported classification decisions fell outside its prescribed timeframe, and too many of the remaining decisions threatened the disclosure of information that continued to require national security protection. It was a situation serious enough to demand a fresh look at the concept of automatic declassification. Taking the bold step of bucking the trend of prior Orders, the drafters of E.O. 12356 concluded that the only rational approach was to abandon the myth of automatic declassification tied to a fixed period of years that may or may not have any relationship to the information's national security sensitivity. Instead, E.O. 12356 takes the only realistic approach, establishing the duration of classification for "as long as required by national security considerations." When they are able to do so, original classifiers are to establish specific dates or events for declassification at the time of classification. Otherwise, declassification follows an agency review, a process that may be initiated at any time by officials inside the agency, or citizens outside of it.

CONCLUSION

Executive Order 12356 is the product of a considerable effort to improve upon its moderately successful, if somewhat flawed, predecessor. Because it consolidates and expands upon the most successful features of prior information security systems, executive branch agencies have greeted its issuance enthusiastically.

At the same time, however, the traditional critics of the information security program have reacted, as could be predicted, negatively. At the heart of their criticism is the charge that the underlying purpose behind E.O. 12356 is to permit the classification of more information than could be classified under E.O. 12065. As this paper illustrates, the perceived flaws of E.O. 12065 did not include the breadth or scope of permissible classification. The authors of E.O. 12356 sought to provide better protection for that very small percentage of information that requires it, not to increase the amount or type of information to be classified.

Nevertheless, E.O. 12356 presents an important challenge to those who must implement it. Some of its critics will constantly scrutinize its implementation, hoping to uncover abuses that might be publicized to undermine its retention. Minimizing abuses represents the most effective countermeasure to this criticism. To do so, E.O. 12356's proponents must scrutinize its implementation even more thoroughly than its critics.

THE WHITE HOUSE

WASHINGTON

March 23, 1984

Dear Mr. Garfinkel:

I was very pleased to review your FY 1983 Annual Report and to learn that the system we have established under Executive Order 12356 to provide better protection for national security information without excessive classification is working. While we anticipated that the revised information security system would improve credibility and efficiency of the program, its success is also dependent upon the outstanding oversight efforts of you and your staff and the thousands of other persons throughout the executive branch who are dedicated to making it work. Please convey my appreciation to all those whose efforts made these achievements possible.

I ask for the same commitment in the future to improving our performance even more. We must continue to insure that information is being classified only when this extraordinary protection is necessary; that those entrusted with access to national security information appreciate the seriousness of their responsibility to safeguard it; and that systematic review and other declassification efforts are made in accordance with the order's goal of making information no longer requiring security protection available to the public.

I trust that you and your staff will continue to work with responsible officials throughout the Government to address these and other issues that relate to the administration of the information security program. I look forward to future reports on the progress that has been made as a result of these efforts.

Sincerely,

Ronald Reagan

General Services Administration
Information Security Oversight Office
Washington, DC 20405

April 23, 1984

Honorable Orrin G. Hatch
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Hatch:

Subject: Testimony on S. 1335, April 3, 1984.

As requested, I have returned my revised testimony on S. 1335 to the Chief Printer for the Committee on the Judiciary.

In your letter and at the hearing, the other witnesses and I were invited to submit additional information for the record. I would like to supplement my testimony by offering the following additional information for the record. In his testimony on behalf of the American Civil Liberties Union, Mark H. Lynch cited to the reclassification of previously disclosed documents by the National Security Agency (NSA) of materials located at the George C. Marshall Library. Mr. Lynch suggested in his testimony that the NSA had failed to notify the Information Security Oversight Office (ISOO) of this reclassification action, as is required under Executive Order 12356. I request that the record note that the NSA did in fact notify ISOO of the reclassification action at the Marshall Library, and involved ISOO in its deliberations over this action.

Thank you again for inviting me to appear at your hearing.

Sincerely,

Steven Garfinkel

STEVEN GARFINKEL
Director

Senator DURENBERGER. Mary?

STATEMENT OF MARY C. LAWTON

Ms. LAWTON. Thank you, Senator.

It is a short statement anyway, but I will just pick up the main points, without describing the bill, which I assume you are very familiar with.

While S. 1335 purports to amend FOIA, it would have the effect of amending Executive Order 12356 indirectly, by instructing Federal officials administering FOIA that in addition to following the President's directive on classification, they must determine that disclosure would cause "identifiable, exceptionally grave damage" for top secret information; "identifiable serious damage" for secret information, and "identifiable damage" for confidential information, and further, that the need to protect against such damage is not outweighed by the public interest.

We have already submitted a letter to the subcommittee concerning the Department's views on S. 1335, and noting that we believe the proposal raises serious constitutional concerns.

The concept of separation of powers is inherent in the constitutional division of governmental responsibility into three branches. Certainly, the division is not rigid, and the Constitution assigns different aspects of some Government responsibilities to different branches. It is clear, however, that the President is Chief Executive, Commander in Chief, and the principal instrument of foreign policy. As such, it is his responsibility to protect state secrets involving the national defense and foreign policy and to instruct his subordinates in this regard. So too, it is the Executive which is empowered to assert the state secrets privilege in the courts.

Through the device of an amendment to FOIA, S. 1335 attempts to assume these executive functions, providing conflicting instructions to executive branch officials to apply different classification/declassification criteria to any records requested under FOIA. In our view, Congress cannot attempt to control the President's decisions with respect to whether particular information needs to be protected in the interest of national security and cannot decree by statute what specific items of diplomatic or intelligence information may merit classification in particular circumstances.

The conflicting "instruction" to executive branch officials presents practical problems as well. Those conducting declassification reviews in FOIA matters would be applying different standards from officials making classification decisions. This will add an unacceptable level of uncertainty to the classification process. Moreover, adding two additional tests to the first FOIA exemption will necessitate even more detailed affidavits explaining the basis for the exemption, increasing both the risk of disclosure and the burden on the executive branch and the courts. Yet if the experience of the past is a basis for predicting the future, the net result is likely to be more and more prolonged litigation, at greater expense, disclosing little or no additional information.

For these reasons, the Department of Justice opposes S. 1335. In our view, information properly classified pursuant to Executive order should be exempt from disclosure under FOIA. The current

language of exemption 1 provides precisely that, and we cannot support any proposal restricting that exemption.

Thank you.

Senator DURENBERGER. I would just ask a question before I go to Mr. Lynch.

Will the record show anywhere, either from Justice or from you, Mr. Garfinkel, how much time has been consumed in litigation, how many dollars have been consumed in litigation, over FOIA requests, say, over the last 7 or 8 years? Has that information been accumulated anywhere?

Ms. LAWTON. There may be some in the record in connection with S. 774, but I am not sure. I was not the witness, and I do not know for certain, Senator. I can certainly ask and find out whether we have submitted anything on that.

Senator DURENBERGER. I am being left with the impression that there wasn't much, but that all of a sudden, after the 1978 Executive order, the litigation shot up as people put pressure on the Government to release information.

Ms. LAWTON. Oh, I do not think it would show that the volume increased. The volume is incredible now, and has been for some years. I think what it would show is simply that it got a little more complex, because you had additional issues. Every word in the statute is one more issue for our lawyers to argue over. Every time you add a word, you add a legal argument, and there were that many more legal arguments complicating the volume of cases, but I do not think increasing the volume.

Senator DURENBERGER. OK.

[The following was received for the record:]

PREPARED STATEMENT OF MARY C. LAWTON

Mr. Chairman and Members of the Subcommittee:

We appreciate the opportunity to appear here today to discuss the Department's views on further amendment to the Freedom of Information Act. It is our understanding that one of the proposals before the Subcommittee is S. 1335 a bill to amend the Freedom of Information Act and, through it, Executive Order 12356. For the reasons I will explain, the Department opposes that bill.

Apart from the specialized provisions concerning restricted data contained in the Atomic Energy Act, provisions relating to the classification of information have always been established by Executive Order. As Chief Executive, Commander-in-Chief and principal instrument of foreign policy, the President has, as the courts have recognized, a responsibility to protect State Secrets. This responsibility has been exercised for many years by establishing a formal system for identifying and categorizing State Secrets, i.e., the classification system. Without going into excessive detail, let me outline the current system.

Executive Order 12356 establishes three basic levels of classification. The levels are based on an assessment of the harm that the disclosure of the information could reasonably be expected to cause:

Top Secret - exceptionally grave damage to the national security;

Secret - serious damage to the national security;

Confidential - damage to the national security.

The Order limits the authority to classify and declassify, with different limits being set for each level of information.

It also establishes regulations for the handling of classified information which vary with the classification level.

It is important to note that the Order "defines" the type of information which may be classified not merely by reference to the harm done by disclosure but also by a list of categories of the sort of State Secrets requiring protection. The list is, of necessity, generic in its descriptions but it nevertheless provides rather clear guidance on proper subjects for classification consideration.

Classified information is expressly exempted from disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1) if it is "in fact properly classified pursuant to such Executive Order." If a requestor has been denied information on the grounds that it is classified a court may review that denial de novo and the burden is on the government to prove that the information is properly classified under the Executive Order.

This system would be changed by S. 1335. It would limit the FOIA exemption to only those properly classified records which meet two additional tests:

(1) matters the disclosure of which could reasonably be expected to cause identifiable damage to national security, and

(2) matters in which the need to protect the information outweighs the public interest in disclosure.

The bill would also alter the present judicial review standard under FOIA. As noted above, the courts presently review FOIA exemption claims de novo. Under S. 1335 the court would use its own judgment as to whether the damage caused by disclosure is "identifiable" (presumably to the court) and could reasonably be expected (presumably by the court) to cause such damage. However, the court's review as to whether the public interest outweighs the need for protection is apparently confined to

deciding whether the agency considered this, not whether the judge would have come to the same conclusion.

While S. 1335 purports to amend FOIA it would have the effect of amending Executive Order 12356 by instructing federal officials administering FOIA that in addition to following the President's directive on classification they must determine that disclosure would cause:

> "identifiable" exceptionally grave damage (Top Secret);
>
> "identifiable" serious damanage (Secret); or
>
> "identifiable" damage (Confidential); and,

further, that the need to protect against such damage is not outweighed by "the public interest."

As explained in more detail in our letter to the Committee concerning S. 1335, we believe this proposal raises serious constitutional concerns. The concept of separation of powers is inherent in the constitutional division of governmental responsibility into three branches. Certainly that division is not rigid and the Constitution assigns different aspects of some governmental responsibilities to different branches. It is clear, however, that the President is Chief Executive, Commander-in-Chief, and the principal instrument of foreign policy. As such it is his responsibility to protect State Secrets involving the national defense and foreign policy and to instruct his subordinates in this regard. So too, it is the Executive which is empowered to assert the State Secrets privilege in the courts.

Through the device of an amendment to FOIA, S. 1335 attempts to assume these Executive functions, providing conflicting instructions to Executive Branch officials to apply different classification/declassification criteria to any records requested under FOIA. In our view Congress cannot

attempt to control the President's decisions with respect to whether particular information needs to be protected in the interest of national security and cannot decree by statute what specific items of diplomatic or intelligence information may merit classification in particular circumstances.

This conflicting "instruction" presents practical problems as well. Those conducting declassification reviews in FOIA matters would be applying different standards from officials making classification decisions. This will add an unacceptable level of uncertainty to the classification process. Moreover, adding two additional tests to the first FOIA exemption will necessitate even more detailed affidavits explaining the basis for the exemption, increasing both the risk of disclosure and the burden on the Executive Branch and the courts. Yet if the experience of the past is a basis for predicting the future, the net result is likely to be more, and more prolonged, litigation, at greater expense, disclosing little or no additional information.

For these reasons the Department of Justice opposes enactment of S. 1335. In our view, information properly classified pursuant to Executive Order should be exempt from disclosure under FOIA. The current language of exemption 1 provides precisely that and we cannot support any proposal restricting that exemption.

Senator DURENBERGER Mr. Lynch.

STATEMENT OF MARK H. LYNCH

Mr. LYNCH. Thank you, Mr. Chairman.

I have a prepared statement, which I would request be included in the record.

Senator DURENBERGER. It will be made part of the record.

Mr. LYNCH. I will summarize that, and perhaps respond to some of the comments that Mr. Garfinkel and Ms. Lawton have made.

We strongly support this bill because it would restore to the FOIA the requirement of showing identifiable damage. Mr. Garfinkel's account of the history of these orders, I think, is illogical and does not make any sense. President Carter included "identifiable" to make it more difficult to classify documents. When you take "identifiable" out, that must mean that it is easier to classify documents.

Now, the administration's principal concern with this provision is in litigation. I think that suggests that the Carter order never made a really significant impact on the bureaucracy. The fact that classification activity has remained fairly constant, rather than reflecting some extraordinary revolution in the past 14 months, probably more accurately demonstrates that the intended effect of Executive Order 12065 never sunk in the way the authors intended.

Also on that score, Mr. Garfinkel makes a great deal of the fact that original classification actions have decreased substantially, and to the extent that has happened, I commend the administration. But I think the key set of figures appears on page 11 of his report, where you see the combined derivative classification actions and original classification actions. If you combine those figures, in fact, classification activity has remained steady, as indeed the heading for that section states on page 11.

Senator DURENBERGER. So has overall classification actually gone up?

Mr. LYNCH. It has remained steady. And I think that, rather than reflecting an achievement in recent years, reflects failure to drive home the reforms intended by the old Executive order.

Let me say one more thing about the identifiable damage test. I am not aware of courts requiring a radically different showing as a result of the identifiable damage. I will certainly confess that I urged on courts that it made a big difference, but I was not terribly successful in prevailing in that argument. And I think in the only court of appeals opinion that I can recall right now that discussed the significance of identifiable damage, Judge Wilkie of the U.S. Court of Appeals of the District of Columbia Circuit said that it did not make a substantial change and did not require any difference in judicial review. [*Baez* v. *Department of Justice,* 647 F.2d 1328, 1336 n. 48 (D.C. Cir. 1980).]

Now, with respect to the balancing test, if the balancing were reviewable de novo, while I would favor that, I would also agree that that would complicate litigation substantially, and I can understand, Senator, why you have decided not to go that route. But the way S. 1335 is drafted, the balancing test will only require decisionmakers to perform that balancing process. It will not enable courts

to second-guess what the balance is. It will only authorize courts to make sure that the process has been performed.

Now, why is a balancing test worth while?

Classification is not an exact science. Whether a document should be classified does not appear with mathematical certainty from its face. Frequently the people who are doing the classification will take into account other considerations, and consequently information which may meet the standards in the Executive order for classification will nonetheless be made public because the administration perceives some overriding interest in doing so.

I think perhaps the classic example of this happening was the decision by President Kennedy and his advisers to reveal the overhead pictures of the Soviet missiles in Cuba. As you know, Senator, from your work on the Intelligence Committee, there isn't much that is more highly and more routinely classified than the products of overhead surveillance. Nonetheless, in this circumstance, it was important to convince the country and the world that there was a serious threat and that firm action was necessary. So that was a case where the balance favored disclosing information which nonetheless was classified.

More recently, this administration has made public a great deal of information about the outside aid to guerrillas in El Salvador. In fact, as you are probably aware from your work in the Intelligence Committee, that involved quite a debate within the intelligence community over whether that information should be made public. But it was made public, because the administration decided that disclosure was important to sell their policy.

Now, there are other kinds of information to which the same calculus could be applied, but decisionmakers, left to their own devices, are only going to apply this calculus when it is in their interest to do so. Consequently, we have not gotten anywhere near as much information about human rights violations in El Salvador as we have about outside aid, although our diplomatic and intelligence services collect both kinds of information. The reason is that information about human rights violations by our allies detracts from the policy whereas information about outside aid to the guerrillas supports the policy.

The value of the balancing test is that it would give the public a foothold to require decisionmakers to apply that calculus to all information which is requested under the Freedom of Information Act. I am not so naive as to think that the balance is always going to come out in favor of public disclosure, particularly when the information is going to be adverse to policy, but it is the decision-forcing mechanism. It is a little like NEPA, in fact, in the environmental area. Since the balancing will not be subject to searching judicial review, it should not cause the kinds of litigation problems that apparently have motivated many of the changes in the new Executive order.

Thank you, Mr. Chairman.

[The following was received for the record:]

PREPARED STATEMENT OF MARK H. LYNCH

Mr. Chairman:

Thank you for your invitation to the American Civil Liberties Union to testify on S. 1335. The ACLU is a nonpartisan organization of over 250,000 members dedicated to defending the Bill of Rights. The ACLU regards the Freedom of Information Act as one of the most important pieces of legislation ever enacted by Congress because the Act positively implements the principle, protected by the First Amendment, that this nation is committed to informed, robust debate on matters of public importance. Accordingly, we strongly support S. 1335 because it would substantially strengthen the FOIA and eliminate two of the most unfortunate features of Executive Order 12356, which was issued by President Reagan on April 6, 1982.

Presidents Eisenhower, Nixon, and Carter each issued Executive Orders on classification which were intended to reduce the amount of information which is classified. President Reagan reversed this trend with E.O. 12356, which made it easier to classify information and to deny requests to declassify information.

Under the preceding E.O., No. 12065, information could not be classified unless its unauthorized disclosure reasonably could be expected to cause identifiable damage to the national security. The current E.O. deletes the word "identifiable" and thus permits classification on a less specific and precise basis.

E.O. 12065 also recognized that in some situations where information meets the minimum standard for classification, "the need to protect the information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified." (Section 3-303.) E.O. 12065 directed that when such questions arose, they should be referred to a senior official who would perform a balancing test to "determine whether the public interest in disclosure outweighs the damage to the national security that

might reasonably be expected from disclosure." (Id.) The present E.O. deleted this balancing provision altogether.

S. 1335 amends exemption one to the FOIA so that classified information cannot be withheld from the public unless (1) it is properly classified under the terms of whatever executive order is in effect, (2) disclosure would cause identifiable damage to the national security, and (3) the need to protect the information outweighs the public interest in disclosure. Thus, S. 1335 locks the requirement of identifiable damage and the balancing test into the statute so that these provisions cannot be removed by an Executive Order.

These two changes in the law will have their greatest value in forcing executive branch decision makers to think more carefully when they classify information or consider declassifying information in response to an FOIA request. We tend too often to think of the FOIA in terms of litigation. But the real value of the Act is not that it sets up a scheme of judicial review of agency decisions but rather that it sets up a scheme for release of information by the agencies themselves. Judicial review and the threat of judicial review are vitally important incentives for the agencies to comply with the Act, but the ultimate aim of the Act is that requests for information should be handled sensibly at the agency level. This bill contributes substantially to that aim.

The requirement of specifying identifiable damage obviously requires a more thoughtful approach to a classification decision than does E.O. 12356. Furthermore, legislating a requirement of identifiable damage involves more than a change in semantics -- it tells the bureaucracy that Congress wants classification kept to a minimum consistent with the national security. E.O. 12356 told the bureaucracy that the standards for classification in E.O. 12065 were too stringent and should be relaxed. There of course was no evidence whatsoever that the bureaucracy had been constrained by E.O. 12065 from classifying information which in fact required protection, and this bill would reverse the unfortunate signal sent by E.O. 12356 that agency officials should feel freer to wield their classification stamps.

The balancing provision of E.O. 12065 was a great step forward in enhancing the public's access to information because it gave the public an opportunity to invoke a process that the executive branch regularly follows at its own initiative when it is in the executive branch's interest to do so. Classification is not an exact science; whether a document should or should not be classified cannot be determined with mathematical certainty. Frequently, the executive branch will decide to disclose information which meets the standards for classification because executive officials perceive an interest in doing so. A classic example was President Kennedy's decision to reveal the overhead photographs of the Soviet missiles in Cuba. Although the products of overhead surveillance are routinely classified at a very high level, disclosure of this graphic evidence was deemed appropriate to convince the nation and the world that there was a serious threat which required a firm response. In short, the public interest in disclosure outweighed the damage that would result from disclosure of sensitive intelligence.

The problem is that the executive branch, left to its own devices, will only consider the public interest in disclosure in those cases where the executive's immediate interests coincide with the public interest. For example, our diplomatic and intelligence services collect information in El Salvador about outside aid to the guerrillas and also about human rights violations (including the murders of the American churchwomen and labor officials) by elements of the military. But the executive branch is much more likely to release information about the former than the latter because information about outside aid bolsters the current policy while information about human rights violations detracts from that policy. Yet the public's interest in both types of information, so that it can assess whether the government's policy is sound, is equal.

The value of the balancing test, which would be restored by S. 1335, is that it enables a member of the public

to require the executive branch to consider the public interest in disclosure of any information requested under the FOIA. The balancing test thus helps to put the public on a par with the bureaucracy with respect to determining what kinds of information should be made public.

While this bill will have great value in the administrative consideration of requests, it will not have a great impact on judicial review of the decisions which this bill will require. Although the requirement of identifiable damage will require a more precise showing by the government to sustain a classification decision, this change will not expand the scope of judicial review. Indeed, in one case decided while E.O. 12065 was in effect, the United States Court of Appeals for the District of Columbia Circuit said that the addition of "identifiable" did not amount to a substantial difference between E.O. 11652 and E.O. 12065 for purposes of judicial review. Baez v. Department of Justice, 647 F.2d 1328, 1336 n.48 (D.C. Cir. 1980).

It is important to note that S. 1335 provides for more limited judicial review with respect to the balancing test than the FOIA provides with respect to the other elements of exemption one. The Act requires courts to conduct a de novo review of an agency's claim that a document is properly classified under the terms of an Executive Order. However, S. 1335 provides that with respect to the balancing test, the court's review is limited to ascertaining wnether the agency performed the balancing test. Thus, this bill does not authorize judges to substitute their judgment on the balance between the public interest and damage to the national security for that of executive branch officials. Although the ACLU would prefer that full judicial review apply to the balancing procedure, this provision, even with limited review, is a substantial contribution to the FOIA because it requires agency officials to consider the public interest and it enables courts to make sure that officials do so.

In conclusion, Mr. Chairman, S. 1335 would be a most useful addition to the FOIA, and the ACLU strongly supports the bill.

OFFICE OF THE DIRECTOR OF DEFENSE RESEARCH AND ENGINEERING
WASHINGTON, D. C. 20301

6 July 1970

MEMORANDUM FOR THE SECRETARY OF DEFENSE

THROUGH: THE DIRECTOR OF DEFENSE RESEARCH AND ENGINEERING

SUBJECT: Final Report of Task Force on Secrecy

The following report of the Defense Science Board was prepared in response to a request of the Director of Defense Research and Engineering. The study was conducted by a special task force of the Board under the chairmanship of Dr. Frederick Seitz. In his memorandum of submittal Dr. Seitz emphasizes the need for "major surgery" in the DoD security system.

With the approval of the Defense Science Board, I recommend this report to you for your consideration.

Gerald F. Tape

Gerald F. Tape
Chairman
Defense Science Board

Report of the

Defense Science Board

TASK FORCE ON SECRECY

1 July 1970

Office of the Director of Defense Research and Engineering
Washington, D.C. 20301

OFFICE OF THE DIRECTOR OF DEFENSE RESEARCH AND ENGINEERING
WASHINGTON, D. C. 20301

1 July 1970

MEMORANDUM FOR THE CHAIRMAN,
DEFENSE SCIENCE BOARD

SUBJECT: DSB Task Force on Secrecy Final Report

The Task Force on Secrecy herewith submits its final report. This report, which has been coordinated with all members of the Defense Science Board, concludes the work of the Task Force.

The report addresses specific questions posed by the DDR&E in general terms since time and resources did not permit establishment of detailed steps required to correct the deficiencies identified in the present DoD scientific and technical information security classification system. These actions are more appropriately the responsibility of the cognizant DoD elements.

In addition, the Task Force considered security classification from the national long range and short range viewpoints. These combined considerations, i.e., the specific questions posed by the DDR&E and the national considerations, resulted in a general conclusion that the DoD security classification system requires major surgery if it is to meet the Defense, national and international environment of today. Specifically, we found that:

1. It is unlikely that classified information will remain secure for periods as long as five years, and it is more reasonable to assume that it will become known to others in periods as short as one year.

2. The negative aspect of classified information in dollar costs, barriers between U.S. and other nations and information flow within the U.S. is not adequately considered in making security classification determinations. We may gain far more by a reasonable policy of openness because we are an open society.

3. Security classification is most profitably applied in areas close to design and production, having to do with detailed drawings

and special techniques of manufacture rather than research and most exploratory development.

4. The amount of scientific and technical information which is classified could profitably be decreased perhaps as much as 90 percent by limiting the amount of information classified and the duration of its classification.

General recommendations to correct these deficiencies are contained in the report.

F. Seitz

Frederick Seitz
Chairman
Task Force on Secrecy

PREFACE

Late in 1969 the Defense Science Board established the Task Force on Secrecy to consider questions pertinent to the classification of information in all stages of research, development, test and evaluation (RDT&E), as well as procurement and deployment.

The members of the Task Force were as follows:

Dr. Frederick Seitz (Chairman)
Dr. Alexander H. Flax
Dr. William G. McMillan
Dr. William B. McLean
Dr. Marshall N. Rosenbluth
Dr. Jack P. Ruina
Dr. Robert L. Sproull
Dr. Gerald F. Tape
Dr. Edward Teller
Mr. Walter C. Christensen (Staff Assistant)

In the course of its discussions, the Task Force consulted a number of individuals and groups, among whom were the following persons:

Dr. John S. Foster, Jr.
Director of Defense Research and Engineering
Dr. Gardiner L. Tucker
Principal Deputy Director of Defense Research and Engineering
Dr. Luis W. Alvarez
Professor of Physics, University of California, Berkeley
Mr. Joseph J. Liebling
Deputy Assistant Secretary of Defense (Security Policy)
Dr. Donald M. MacArthur
Deputy Director (Research & Technology), ODDR&E
Lt. Colonel John M. MacCallum
Advanced Research Projects Agency
Dr. Michael M. May, Director, and associates
Lawrence Radiation Laboratory
Mr. Walter McGough
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Director of Nuclear Power, Naval Ship Systems Command
Rear Admiral Levering Smith, USN
Director, Strategic Systems Project Office, Naval Material Command
Dr. Eugene Wigner
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SUMMARY

General Comments

1. The Task Force considered the matter of classification from several viewpoints; however, it focused its main attention on the classification of scientific and technical information.

2. The Task Force noted that it is unlikely that classified information will remain secure for periods as long as five years, and it is more reasonable to assume that it will become known by others in periods as short as one year through independent discovery, clandestine disclosure or other means.

3. The Task Force noted that the classification of information has both negative as well as positive aspects. On the negative side, in addition to the dollar costs of operating under conditions of classification and of maintaining our information security system, classification establishes barriers between nations, creates areas of uncertainty in the public mind on policy issues, and impedes the flow of useful information within our own country as well as abroad.

4. The Task Force noted that more might be gained than lost if our nation were to adopt--unilaterally, if necessary--a policy of complete openness in all areas of information, but agreed that in spite of the great advantages that might accrue from such a policy, it is not a practical proposal at the present time. The Task Force believes that such a policy would not be acceptable within the current framework of national attitudes toward classified Defense work. A number of areas of information in which classification may be expected to continue are listed in the text.

5. The Task Force noted that the types of scientific and technical information that most deserve classification lie in those phases close to the design and production, having to do with detailed drawings and special techniques of manufacture. Such information is similar to that which industry often treats as proprietary and is not infrequently closer to the technical arts than to science. The Task Force believes that most of the force of attention in classifying technical information should be directed to these phases rather than to research and exploratory development.

6. In the opinion of the Task Force the volume of scientific and technical information that is classified could profitably be decreased by perhaps as much as 90 percent through limiting the amount of information classified and the duration of its classification. Such action would better serve to protect that information necessarily classified since then the regulations concerning the enforcement of classification could be applied more rigorously than at present.

Recommendations

General

1. Selectivity in classifying. In overhauling our classification guides the advantages that might accrue from inhibiting the acquisition of the information by a competitor or potential enemy through classification should be balanced against the advantages of possibly speeding development in the U. S. through not classifying the information.

2. Time limit on classification. Whenever a document is classified a time limit should be set for its automatic declassification. This time limit should be adapted to the specific topic involved. As a general guideline, one may set a period between one and five years for complete declassification. (Note, however, the exemptions stated below for certain types of information.) This time limit should be extended only if clear evidence is presented that changed circumstances make such an extension necessary.

3. Declassification of material now classified. All material now classified should be reviewed as soon as possible after the adoption of the new policy; we hope this might be accomplished in as short a time as two years. The review should either declassify the document or set an appropriate date for its declassification.

Research, Development and Deployment

1. As a general rule, research and early development should be unclassified. Thus in the main, 6.1 and 6.2 should be open, while 6.3 may be classified. The partition between 6.2 and 6.3 is not rigid, and classification should be tailored to fit the individual circumstances.

2. In general, we expect classification to be most justifiable when the development approaches the "blueprint" stage. This coincides with the phase when expenditures become substantial. Protection is most desirable when an item requiring a considerable lead time for development is being prepared for deployment.

3. After deployment, classification may be reduced or canceled. At that stage, the information will have been disseminated to many people so tight classification may no longer be realistic. Secrecy will usually be most valuable in maintaining a technological lead during the period of development.

4. The Task Force believes that the "Confidential" category is not appropriate for R&D programs and that "special access" limitations are more likely than not to seriously impede difficult technical programs.

Plans and Operations

1. In contrast, the information involved in high-level planning requires rigid protection on a need-to-know basis. To declassify such information would not speed technical development; the contingencies envisaged in such planning may never arise, and their publication may cause ill feelings. The only reason for declassification is the interest of the historian. Stringently limited distribution and extended classification time limits may be justified in this category.

2. Information relating to specific operational plans should remain classified as long as the plan is in effect--and perhaps even beyond, insofar as declassification could reveal genuine details of possible use to a potential enemy in developing countermeasures. If secrecy is required, the best protection is afforded by frequent changes in the pattern of operations. Classification of a specific operational plan should be promptly canceled if it becomes irrelevant.

Responses to Specific Questions

The Task Force's responses to specific questions posed in its charter are as follows:

Question: Is our security system generally effective in denying to potential enemies DoD information that affects the national security? As a corollary question, how long can we reasonably expect that classified information will remain unknown to potential enemies?

Response: Security has a limited effectiveness. One may guess that tightly controlled information will remain secret, on the average, for perhaps five years. But on vital information, one should not rely on effective secrecy for more than one year. The Task Force believes that classification may sometimes be more effective in withholding information from our friends than from potential enemies. It further

emphasizes that never in the past has it been possible to keep secret the truly important discoveries, such as the discovery that an atomic bomb can be made to work or that hypersonic flight is possible.

Question: Granted that excessive use is being made of classification and limitations on distribution, what practical steps can be taken to better define the DoD information that should be protected in the interest of national security? Consideration of this question should include the cost and effect of controlling DoD information to the U. S. and its allies, versus the benefits to potential enemies of its open release.

Response: Starting from the premise that the interests of an open society and the speedy exploitation of technology are best served by minimal classification consistent with essential security, the Task Force identified a number of critical areas to be discussed below, in which continued classification appears justified. These critical areas span a much narrower region, however, than is now included under existing classification rules.

The Task Force felt equipped to recommend only general philosophy, as opposed to detailed classification guidelines. Also, we did not consider monetary costs of security measures but only their likely inhibition on U. S. technological development.

Specifically, it is recommended that the present emphasis, that promotes classification, be reversed to discourage classification by requiring in each instance of classification:

- a meaningful written justification by the initiator of the classification action; and

- a time limit on the classification, as short as possible, which could be extended with detailed justification.

Question: Are there key points in the research, development, production and deployment cycle at which information should be controlled? That is, should we adopt the policy that all DoD research be unclassified and freely available and therefore impose controls only on information pertaining to specific pieces of hardware? One point which should be carefully considered here is the additional lead time that will be available to a potential enemy if he obtains knowledge of our significant research and technology activities and thus can predict its end use in a weapon system.

Response: The Task Force has weighed the detrimental effect of security controls on the conduct of R&D programs against the need to meet other national objectives and to avoid disclosures beneficial to potential enemies. It appears that little is to be gained by classifying basic research; it is noted that DoD policy and practices are already in virtually complete accord with this view. Similarly, it seems that, as a general rule, much of the early exploratory development could be kept unclassified. Exceptions should require formal documentation and formal approval by OSD; each approval of classification in this category should be accompanied by a rigid deadline for declassification.

For all other development work, including advanced exploratory development and advanced development, classification procedures similar to those employed today are suitable. The criteria should be sharpened, however, so that classification may be imposed only to preclude major technological advantages to potential enemies, to prevent disclosure of information of major importance in the development of countermeasures, or to support national policy directives and regulations. Within this framework, the classification of each system, component, subsystem or technique in advanced development should be considered individually on its own merits. Here, too, a rigid schedule for declassification should be imposed from the beginning.

Major programmatic changes in any category of classified R&D should be accompanied by reconsideration of the program's security classification. Particularly, when a system is operationally deployed, the large increase in known system technology and its diffusion among many people should be recognized, and classification should be revised accordingly, with major emphasis on preventing disclosure of system vulnerabilities and on forestalling the early development of specific countermeasures by potential enemies.

DISCUSSION OF PRIME FACTORS AND EFFECTS IN CLASSIFICATION

1. General Significance of Classification

Although the Task Force was composed of individuals whose backgrounds are in science and engineering, the group sought responses to its assignment from a broader viewpoint since it was felt quite strongly that the issue of classification and the way it is handled has a significant effect on the posture of our nation in the international community, particularly in relation to our ability to unite and strengthen the free nations of the world. To emphasize this point, one of the members quoted an opinion expressed by Niels Bohr soon after World War II that, while secrecy is an effective instrument in a closed society, it is much less effective in an open society in the long run; instead, the open society should recognize that openness is one of its strongest weapons, for it accelerates mutual understanding and reduces barriers to rapid development.

We believe that overclassification has contributed to the credibility gap that evidently exists between the government and an influential segment of the population. A democratic society requires knowledge of the facts in order to assess its government's actions. An orderly process of disclosure would contribute to informed discussions of issues.

When an otherwise open society attempts to use classification as a protective device, it may in the long run increase the difficulties of communications within its own structure so that commensurate gains are not obtained. Experience shows that, given time, a sophisticated, determined and unscrupulous adversary can usually penetrate the secrecy barriers of an open society. The Soviet Union very rapidly gained knowledge of our wartime work on nuclear weapons in spite of the very high level of classification assigned to it. The barriers are apt to be far more effective against restrained friends or against incompetents, and neither pose serious threats.

Beyond such general matters, the Task Force noted that there are frequent disclosures of classified information by public officials, the news media and quasi-technical journals. While the reliability and credibility of such information frequently may be in doubt, the magnitude of leaks indicates that, at present, our society has limited respect for current practices and laws relating to secrecy. It would be prudent

to modify the present system to one that can be both respected and enforced.

2. Some Major Areas in Which Classification Should Continue

The Task Force recognized that there are major areas in which classification is either traditional or expected. The Task Force did not attempt to reach unanimity on the extent to which such classification is necessary. The following are examples of such areas:

2.1 International Negotiations

There are many international negotiations in which discussions are facilitated by secrecy, even though the results may eventually be disclosed. Secrecy permits greater freedom of discussion at the conference table and the consideration of a much wider framework of new ideas and proposals than might otherwise be the case.

2.2 Plans for Hypothetical Emergencies

It is frequently advantageous to classify plans for assumed emergencies in order to limit their circulation. Such plans may include alarming contingencies that may never occur at all--or, at least, not be realized in the way assumed when the plans were developed.

2.3 Tactical and Operational Plans

There are many tactical and operational plans that would lose their effectiveness, or even be jeopardized, if they were not maintained secure for at least a limited period of time. For example, detailed plans for the disposition and operation of the Polaris fleet, or the state of readiness of combat groups prior to engagement may, for purposes of effectiveness, deserve to be classified for a specified period of time.

2.4 Intelligence Information

Information gained through intelligence channels often must be classified for a period of time in order to protect the sources of information, that would dry up if revealed. Nevertheless, intelligence that is critical to an understanding of our national posture should be disseminated as soon as possible, and in as much detail as feasible (consistent with not compromising our collection capability). Careful consideration should be given to the question: To what extent could

openness and international sharing of information gathered by physical observation improve our position?

2.5 Specific R&D Efforts

There may be a good reason for limiting disclosure of the magnitude and direction of our efforts in specific fields of research and development for a time, when plans for production are congealing, in order to maximize the advantages gained through lead time. In all such cases we must continue to recognize that the lead gained will be transitory unless each advance is followed by another.

2.6 Vulnerabilities

It appears essential to restrict information concerning major weaknesses of operational systems, particularly before remedies for those weaknesses are completed. At the same time, one must ensure that such restrictions do not result in the lack of recognition of the problem or in failure to remedy the situation.

3. General Classification Philosophy

Some members of the Task Force are inclined to the view that, as a nation, we would have more to gain in the long run by pursuing a policy of complete openness in all matters. For example, the Strategic Arms Limitation Talks (SALT) might be more realistic if they were accompanied by a full and open public disclosure of knowledge of weapons capabilities and state-of-the-art developments, preferably by both sides, but at least on our part--especially what we know about Soviet systems. In this way, the Congress and the general public would be better informed regarding the significance of the SALT discussions. Similarly, some members of the Task Force feel that public discussion of matters such as the SAFEGUARD system would be given a more realistic basis if intelligence information and analysis were made openly available, even if this meant disclosing information on certain collection techniques, providing these would not be jeopardized by open discussion.

Nevertheless, the Task Force eventually agreed that it would be very difficult to obtain broad acceptance of highly radical changes in classification at this time because of understandable conservatism and deeply ingrained attitudes. Such attitudes would make it difficult to alter significantly present laws and regulations. The most that can be hoped for in the short run is that the present system might be

overhauled extensively in order to make it more realistic, in which case it could be respected and enforced far more completely.

In spite of this area of agreement concerning the necessity for secrecy in limited cases, the Task Force emphasizes that there are very great disadvantages to extensive reliance on secrecy in our society.

4. Classification of Technical Information

With respect to technical information, it is understandable that our society would turn to secrecy in an attempt to optimize the advantage to national security that may be gained from new discoveries or innovations associated with science and engineering. However, it must be recognized, first, that certain kinds of technical information are easily discovered independently, or regenerated, once a reasonably sophisticated group decides it is worthwhile to do so. In spite of very elaborate and costly measures taken independently by the U. S. and the U. S. S. R. to preserve technical secrecy, neither the United Kingdom nor China was long delayed in developing hydrogen weapons. Also, classification of technical information impedes its flow within our own system, and, may easily do far more harm than good by stifling critical discussion and review or by engendering frustration. There are many cases in which the declassification of technical information within our system probably had a beneficial effect and its classification has had a deleterious one:

(1) The U. S. lead in microwave electronics and in computer technology was uniformly and greatly raised after the decision in 1946 to release the results of wartime research in these fields.

(2) Research and development on the peaceful uses of nuclear reactors accelerated remarkably within our country, as well as internationally, once a decision was made in the mid-1950s to declassify the field.

(3) It is highly questionable whether transistor technology would have developed as successfully as it has in the past 20 years had it not been the object of essentially open research.

As a result of considerations of this kind, the Task Force believes that much of research and exploratory development (essentially all of 6.1, most of 6.2 and some of 6.3) should generally be unclassified; at the same time, we realize that the greatest value of classification

rests in the preservation of designs and specialized techniques close to assembly and production and more akin to the technical arts.

In this connection one of the members emphasized that, to the extent that technical information should be safeguarded in behalf of national security, the greatest importance should be attached to what might be called proprietary technical information--information not unlike that relating to fabrication and production which industrial organizations attempt to preserve from competitors. Thus, significant advantages can be obtained in some areas of categories 6.4 and 6.6 by classification. Even here, however, it should be recognized that restrictions on the dissemination of such information may impede its exploitation within our national community at least as much as it impedes those foreign nations which would not scruple to attempt to obtain it through espionage.

5. Classification Criteria and Limitations

It is the considered opinion of the Task Force that past procedures--according to which classification rested largely on the desire to withhold information from other nations--should be modified to give greater consideration to the effects of classification on our own progress. It should be emphasized that a strong voice, that of the U. S. Congress, is primarily influenced by the requirement to withhold information from others. The effects of classification on our own progress will have to be carefully discussed. We believe that scientific and engineering information, short of detailed blueprints and critical techniques relevant to production, should be classified only after having been justified by very special reasons. At the time of classification, a date should be specified after which the classification would be removed. This period should be as short as possible, and an extension should be granted only when fully justified.

At present, a major proportion of technical information classified Top Secret is subject to a declassification pattern designated as 3-3-6, whereby they are downgraded to Secret in three years and to Confidential in another three, and made open after an additional six years. We believe that, for most technical items, this is much too long.

The Task Force was inclined to the view that the classification category of "Confidential," as applied at present to research and development not bearing immediately on field problems of military interest, is probably useless, or even detrimental, for it prevents normal diffusion of information without providing a really effective barrier to leaks. It probably would be much more realistic to confine

this category of classification to matters bearing on military plans and readiness.

For somewhat different reasons, it appeared to the Task Force that the category of "Special Access," as applied to areas of research and technology, should be carefully monitored to avoid unduly limiting the number of competent technical minds that provide innovative contributions in the area. In the one case examined (Eighth Card), the Task Force believes that Special Access should never have been applied. In circumstances such as those that prevailed during World War II, when most of the best scientists and engineers were engaged in classified defense research, on a full-time basis, it may be feasible to bring to bear a suitably diverse spectrum of minds and talents even on those areas designated "Special Access." But this would be exceedingly difficult under present-day conditions when so many competent technologists are associated, if at all, only peripherally to military research and development. The more open the areas of investigation, the more dynamic will be our national approach to the exploratory phases of research and development.

6. Other Observations

As a result of limitations on time and staff, the Task Force could not explore all facets of the field of classification. It did, however, attempt to gain an understanding of the way in which classification procedures work at the detailed level in a few cases. The following observations may be made:

(1) Although there are many alert and imaginative professional experts engaged in assigning and administering classification, as long as the classified material remains so voluminous it is obvious that routine procedure can become too burdensome. There is also a quite understandable bureaucratic tendency to overclassify and to continue classification too long. If the amount of classified material could be reduced to, say, 10 percent of its present volume, a much more thoughtful and effective control could be established across the board.

(2) It was noted that the laboratories in which highly classified work is carried out have been encountering more and more difficulty in recruiting the most brilliant and capable minds. One member of the Task Force made the pessimistic prediction that, if present trends continue for another decade, our national effort in weapons research will become little better than mediocre. In classified work, the increasing isolation and limited accountability to one's scientific peers contribute to this degradation. In addition, it is worth noting that the many scientists and engineers in academic circles who are willing to work on problems related to national defense would find it somewhat easier to do so in the environment which prevails at present if the classified areas were reduced greatly, as the Task Force believes should be the case.

(3) The Task Force emphasizes that modifications in the pattern of classification alone will not be a panacea for the difficulties the Defense establishment faces.

Senator DURENBERGER. Would you make some comment, before you finish, on Mary's constitutional argument?

Mr. LYNCH. Oh, certainly. That is a lot of bluff, in my view.

Senator DURENBERGER. That is fine. Thank you very much. [Laughter.]

Mr. LYNCH. Pardon?

Senator DURENBERGER. I thought so, anyway, but she was told to address it, I am sure.

Mr. LYNCH. Let me say a little bit more. That may sound like a harsh judgment, but I think it has a sound historical basis. In 1974, when Congress amended the Freedom of Information Act to provide for judicial review of classification decisions, President Ford vetoed the bill, and his concern with constitutional problems was one of his principal reasons for doing so. In fact, I would not be surprised if Mary Lawton had something to do with drafting his statement and some of the materials that were used in conducting the debate at that time.

Despite the President's view that the act was unconstitutional insofar as it authorized judges to review classification decisions, the Justice Department has never made a constitutional challenge to the statute. And in fact, it had a couple of opportunities to do so. There was a case in the early part of this administration called *Holy Spirit Association* v. *CIA,* where lower courts had ordered disclosure of information which the CIA determined was classified. The cert petition presented to the Supreme Court argued that the courts below had failed to accord the deference required by the act. They did not argue that the Constitution precluded judicial review. It was not one of the questions presented.

A similar opportunity, perhaps less clear than the one in the Holy Spirit case, presented itself recently in a case called *Symms* v. *CIA,* which involves the disclosure of unclassified intelligence sources, and again, the Government's cert petition did not make any constitutional challenge. There are sort of penumbral suggestions that this is a constitutionally sensitive area, but despite the argument in 1974 from President Ford that the act was unconstitutional, the argument has never been carried forward in the courts.

On the substantive matter of constitutional law, I have not seen the letter which the Justice Department submitted to the committee, but I would be delighted to respond to that in answering your questions. Basically, that position that the act would raise constitutional problems is based on the concept that the President has absolutely independent and sole authority with respect to national security information. That simply is not the modern concept of separation of powers. In fact, it is not a concept of separation of powers that the Supreme Court has ever accepted. If Congress decides to get into the business of regulating national security information, in my view, there is little question that it can exercise that role consistent with the doctrine of separation of powers. But I would be happy to respond at length to whatever their argument is.

Senator DURENBERGER. OK.

Senator Grassley?

Senator GRASSLEY. I have to leave right away, but I would like to know, can you cite any specific examples of abuse of Executive Order 12356?

Mr. LYNCH. Oh, sure. I just got a file the other day from a client, a person who had applied for a job with the FBI. The application form sent in by the person was classified "secret"; just the application form, which the client had sent in independently. But when this person got his file back from the FBI, the application form had been classified "secret. "

On a more massive scale, we have the situation where the National Security Agency went down to the John Marshall Library at the Virginia Military Institute and classified a number of documents in the papers of William Friedman—documents which NSA had reviewed on probably five previous occasions and had determined were not classified. Those documents were on the public shelves for about some 6 years. They had been reviewed by a number of researchers. They were used in a book. And as recently as 2 months ago, NSA exercised the authority to classify documents that had been that widely available. I also suspect that they probably failed to comply with the provisions of the current Executive order, which require that kind of reclassification be reported in writing to ISOO, because there is no mention of that incident in Mr. Garfinkel's report.

Senator GRASSLEY. Then, in regard to the need for S. 1335, since we heard testimony citing a decrease in classification actions for at least 1983, you are still taking the position that there is a need.

Mr. LYNCH. Yes, Senator. First of all, I am delighted that there has been a decrease in original classifications, but as I pointed out, if you look on page 11, the total classification activity have remained constant. But furthermore, the real test of the Executive order, for the purposes of the requester, is what happens on a request for declassification, either under the mandatory provisions of the Executive order or through the Freedom of Information Act. Not that many people request documents which were generated yesterday, where original classification makes a great deal of difference. Most people request documents that are of some age and may well have been properly classified at the outset. And for members of the public, the most important action takes place with respect to declassification, and this bill would be very, very valuable in that respect.

Senator DURENBERGER. If you will yield, Chuck, I am not sure what page it is on, but the information I have says that if you look at the number of pages of information released through declassification, in 1981, the total was 28 million pages; in 1982, it was 17 million pages, and by 1983, it had declined to just 8 million pages.

Mr. GARFINKEL. Could I respond to that, Senator Durenberger?

Senator DURENBERGER. Certainly.

Mr. GARFINKEL. If I could, since we have gotten onto statistics within the report, I would first like to respond to Mr. Lynch's assertion that the critical figure is not the 200,000 decrease in original classification in fiscal year 1983. This is, to me, an incredible example of our, as we frequently are, being damned if we do and damned if we don't.

The most important measurement of classification activity is original classification activity, because it is only in the original classification process that an authorized classifier is making a judgment about whether information is national security sensitive or

not. In the derivative classification process, a person is obligated by the classification of the original source to apply the same classification instructions. Original classification is critically important because each original classification decision on the average ultimately results in 19 other derivative classification decisions, for a total of 20 classification decisions. Therefore, if we can decrease original classification, we can expect in the future to decrease significantly the amount of overall classification.

Another very important point that we should make with respect to this is that overall classification as reflected in this report largely represents derivative classification actions based on original classification decisions that were made in fiscal year 1982 and before, not on original classification decisions made in fiscal year 1983.

With respect to Mr. Lynch's assertion that 12065 simply failed to take, I would suggest that our figures demonstrate that overall classification in the last couple of years of the previous administration was increasing at a rate of by about 8 to 10 percent; in this past year and the year before, overall classification, including original and derivative, has increased about 2 to 3 percent. And I would suggest in the context of tremendously increased appropriations for the defense establishment and the intelligence community, this percentage shows tremendous restraint on the part of the executive branch in keeping the lid on classification activity.

Senator DURENBERGER. Dr. Sproull, we appreciate your being here, and we appreciate your patience this morning. We look forward to your testimony.

STATEMENT OF DR. ROBERT L. SPROULL

Dr. SPROULL. Thank you. There is going to be a very sharp change of gears at this point, as you will appreciate if you have seen my testimony, and I do not intend to read it. I would like to make some footnotes as we go along, if you have it there.

Senator DURENBERGER. Your written statement will be made a part of the record, and you may abbreviate it.

Dr. SPROULL. Thank you.

I have no competence in this area that has just been discussed. If I have any competence at all, it is in connection with the Department of Defense and the Department of Energy, in connection with science and technology matters.

I guess the reason I was asked to testify is that when I was Chairman of the Defense Science Board, we set up a task force to look into the classification policy and especially classification practice at that time.

In my testimony, I liken this whole process to the sawteeth of a common saw, in which classification, at least in the areas I am familiar with, just gradually gets more and more invasive into science and technology, and unless it is arrested with a sharp cut from time to time, I do not know what would happen. But in 1969 and 1970, we got to be alarmed at the extent to which classification was interfering with the development of the country's strength in science and technology and its application in military preparedness. And that was the reason for this task force. You have quoted it to some extent; I have quoted it elsewhere in my testimony. The

main points were that there were negative as well as positive aspects to classification; that the advantages that might accrue from inhibiting the acquisition of information by a competitor or potential enemy should be balanced against the advantage of possibly speedy development in the United States through not classifying. And that is why I am testifying primarily on behalf of the balancing test, and the general setting that reintroducing that into the language of the country will make when the classification eagles do their work. And I think that setting is terribly important, even if the specific provisions of the law are not in front of the person when he is doing the classification.

The other points that we were concerned about were the time limit on classification—and you, a few minutes ago, pointed out quite accurately what we said about that—and finally, the question of declassification of material, and you also quoted on that. We thought that as much as 90 percent of the material then classified should be declassified and that, in fact, the protection of the remaining 10 percent would be better, and particularly the flourishing of science and technology would be better if that were to occur.

Incidentally, we have no hope whatsoever that that 90 percent would be done, but we thought that we would try to get that as far as we could. It was not an incautious statement, however. We were perfectly prepared to have it taken literally, but we were not so naive as to think that that would happen.

The example I cited about a particularly notable development that occurred outside the classification fence that would certainly have been classified had it occurred in the Department of Defense or Department of Energy is only one of many examples that could be cited. Others are microwave electronics, first the card-programmed and then the stored-programmed computer, lasers, superconductors—the list goes on and on, of items that would have been classified if the person developing the idea or the discovery happened to be initially inside the classification fence.

The unsophisticated believe that an invention is the same thing as a product, and a product is the same thing as an industry. There is an enormous difference between an invention and a product and between a product and an industry. It takes a tremendous infrastructure of the country to make those differences.

Translated into military terms, the unsophisticated think that an idea is the same thing as a weapon, and a weapon is the same thing as a military capability. Again, it takes a lot of doing along the way to convert an idea to a military capability.

In doing that, classification is inhibitive at every step of the way. We, in fact, on the Defense Science Board Task Force, recommended that the classification confidential be not used at all, except for instruction manuals for the maintenance of military equipment. Once equipment is in the field, any attempt to classify it inhibits the use of it, but for a while anyway, a year or two, the maintenance manual of an F-15 might be classified appropriately, but within 1 year or so, all it does it raise the cost by a few cents or a few dollars to our opponents to get those manuals. So it is not a useful thing to do.

The reason I am testifying in behalf of Senate 1335 is that I believe it would signal to Government employees generally that they

should think very hard whether they should classify something, and that they should weigh very carefully the advantages versus the disadvantages. In fact, in that Defense Science Board Task Force report, there was a recommendation that the initiator of an original classification identify himself and his reasons and set a time limit, in short, to make it as easy for him to underclassify as it is now easy for him to overclassify.

I do not know whether the committee would like to have that task force report in the record. It is only 11 pages, and I would be glad to supply it for the record. It is just as lively a document now as it was when it was written.

Senator DURENBERGER. Yes, we will make it a part of the record.

Dr. SPROULL. That concludes my testimony, but I would be glad to answer questions.

[The following was received for the record:]

Prepared Statement of Robert L. Sproull

I am happy to testify on behalf of S.1335. The brevity of this bill might be misread as indicating lack of importance, but this is an extremely important matter. The brevity matches the brevity of Executive Order 12356 which, by deleting a word and a short section and changing a dozen other words in its predecessor, modified classification policy in a dangerous way.

Let me first state that I have no competence to contribute to the judicial aspects of this subject, which were discussed by distinguished Senators on the Floor on 1 May 1983. Further, I have very limited competence to discuss classification and secrecy in the context of military operations and intelligence collection, but from what experience I do have I believe that S.1335 in no way hampers such activities or imperils our forces.

What I should like to discuss is the effect of overclassification and thoughtless secrecy on the strength of the Nation's science and technology. The key element here is the "balancing test" that would be restored by the last phrase of S.1335. I appreciate that this provision introduces a complexity that could be misused by writers of cheap exposés and could possibly be misapplied by the courts. But it seems to me to be the vital consideration in deciding what is open and what is classified and I endorse it warmly.

Classification policy and practice resemble the teeth of a saw: They gradually increase the amount classified and the intensity of control year-by-year. Only if from time to time a halt can be called, like the sharp drop of the face of the saw tooth, can this process be prevented from growing out of control.

In 1969 the Defense Science Board became very concerned about the way overclassification was decreasing the Nation's security. We set up a Task Force on Secrecy composed of nine of the most knowledgeable and distinguished of the

country's engineers and scientists, all of whom had extensive experience inside the classification fence. Dr. Frederick Seitz, then President of Rockefeller University and at that time recently retired as President of the National Academy of Sciences, was Chairman.

Their report in February 1970 is just as wise and relevant as if it were written last week. The central point from the General Comments section was:

> "The Task Force noted that the classification of information has both negative as well as positive aspects. On the negative side, in addition to the dollar costs of operating under conditions of classification and maintaining our information security system, classification establishes barriers between nations, creates areas of uncertainty in the public mind on policy issues, and impedes the flow of useful information within our own country as well as abroad."

The complete "General Recommendations" section is quoted here:

> "1. Selectivity in classifying. In overhauling our classification guidelines the advantages that may accrue from inhibiting the acquisition of the information by a competitor or potential enemy through classification should be balanced against the advantages of possibly speeding development in the United States through not classifying the information.
>
> "2. Time limit on classification. Whenever a document is classified, a time limit should be set for its automatic declassification. This limit should be adapted to the specific topic involved. As a general guideline, one may set a period between one and five years for complete declassification. (Note, however, the exemption stated below

for certain types of information.)* This time limit should be extended only if clear evidence is presented that changed circumstances make such an extension necessary.

"3. Declassification of material now classified. All material now classified should be reviewed as soon as possible after the adoption of the new policy; we hope this might be accomplished in as short a time as two years. The review should either declassify the document or set an appropriate date for its declassification."

The report received a warmly sympathetic hearing from the then Deputy Secretary of Defense and was treated seriously by him and by the Secretary. I believe it served as the face of the saw tooth and arrested for a time the otherwise monotonically increasing overclassification. In addition, although we did not expect Recommendation 3 to be adopted literally and it was not, a great deal of declassification did occur.

You will have noted in these recommendations the flavor of balancing the protection afforded by secrecy and classification against the advancement of the public interest by remaining unclassified. This balancing requires knowledge, experience, and (that most precious of all capabilities) good judgment. It is far easier for the Government employee to classify than to permit freedom of access. I believe it is for this reason that overclassification steadily increases and must be arrested periodically. These hearings are especially welcome because I believe another arresting is timely or even overdue.

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*Later in the Recommendations, this exemption was explained in detail. The main point was that "Declassification of [planning] information is not required to speed technical development; the contingencies envisaged may never arise and publication may cause ill feelings."

There have been two basic approaches to the security of the American position, whether it be the kind of security well-known as "military security" or the kind of security of the competitive position of an industry or an idea. One view is that security is obtained by secrecy, by protecting the capability of a new fighter plane or protecting a new idea from any disclosure to a potential enemy. Clearly one can have an edge of a few years by keeping an aircraft's operational characteristics secret during development, and he should. Once the aircraft becomes operational, however, its effectiveness depends upon a large number of people knowing its characteristics for training and maintenance, and secrecy must be drastically relaxed. A new idea, too, needs an incubation period, a time when the inventor can think through all the implications he can. At this point he will presumably write a patent disclosure if the idea has practical consequences. There also needs to be time of a few weeks where he can then discuss the idea with several members of the same project and even with cooperative workers at similar projects. By this time, he should be ready to publish and he should be allowed to do so.

Thus the first approach, security by secrecy, sometimes has an appropriate role, but only for a limited time.

In the longer term, the only promising approach is the second alternative, security by achievement. It produces the maximum speed of development within the project and its cooperative neighbors, the maximum speed of training young people, and ultimately the greatest strength of the country and of its institutions (including both industry and the military).

It is instructive in this connection to think of the now familiar example of the transistor. It is my firm belief that if the transistor had been developed behind the security fence, the United States would now be nowhere near as strong and secure a country. Had it been developed in secrecy, it would certainly have been

classified and it probably would have remained a classified development for many years. The whole industry of solid state devices and computers and communications devices based on them could not possibly have developed as rapidly. Our protection from the Soviet Union, which was especially necessary in the days of Minuteman I, could not have been created.

It is instructive to review what it took to do this. First it took the invention by Shockley and his associates at Bell Telephone Laboratories. They developed their observations and ideas in industrial secrecy for several months, but then they published the original papers in September of 1948. These papers galvanized activity all over America. The activity at BTL was expanded more rapidly than at any other place, and it led to Shockley's 1949 paper in the Bell System Technical Journal on "The Theory of the Junction Transistor" and the Shockley, Sparks, and Teal paper in the summer of 1951.

The idea was carried from an invention to an industry very quickly because of the publication and because of the Government support for solid state physics research in the universities, starting with the Office of Naval Research in 1946. The ONR and other agencies had been supporting the chemistry, physics, and metallurgy of a wide range of materials, especially nearly pure single crystals, and the blossoming of the field would not have been possible without the foresight and good sense of ONR and the agencies that followed in its pattern. A little later, when solid state devices permitted the explosive expansion of the computer, the Government-supported work in universities in mathematics, augmented by IBM's support and later support by other companies, produced a similar possibility for the computer.

Let me emphasize the point of security by achievement by stating the negative side. The Federal Government cannot guarantee security. It is asked to do so every day, especially now that one of the largest moneymaking enterprises in America is selling fear books and catastrophe movies. I need hardly emphasize to this audience the impossibility of guaranteeing security.

The Federal Government can, however, guarantee insecurity. It can do this in either of two ways, both of which are superficially attractive. The first is by imposing secrecy on every bright idea that comes along. This will stop development in our open society and it will give us a false sense of confidence, but it will slow down the closed societies we compete with for only a few months. The second way the Federal Government can guarantee insecurity is by failing to support and develop the infrastructure, the young people who are prepared to exploit new developments fast. Cutting back on support of graduate training, forcing universities to have ever more obsolete equipment and facilities, and increasing the tensions on campuses between science and technology on the one hand and the humanities on the other by under-nourishment will do a fine job of making this guarantee work.

In recent years the restrictions of classification have been augmented by the Export Administration Act (EAA) and its associated Export Administration Regulations (EAR) and by the arms Export Control Act and its associated International Traffic in Arms Regulations (ITAR). These acts are being zealously administered, perhaps more zealously than Congress intended. The administration of them threatens American science and engineering which thrive through international communication and competition. The distinguished Panel on Scientific Communication and National Security, under the chairmanship of Dr. Dale R. Corson and under the auspices of the National Academy of Sciences, reported two years ago that these regulations were potentially damaging to the security of the country. Not surprisingly, their chapter on general conclusions was subtitled "Balancing the Costs and Benefits of Controls." They recommended very strict tests before any controls were imposed on publication and international communication in science and technology, and wisdom and self restraint in any application of controls. Although I believe S.1335 does not apply to these regulations, I believe that its passage would be helpful in establishing the intent of Congress that we not isolate our nation and its talented scientists and engineers within a protective cocoon of classification.

I realize that in these brief remarks I have not been able to do justice to this important subject, as venerable as the Republic itself, but I should be happy to attempt to answer your questions.

Senator DURENBERGER. I thank you very much for coming down, Dr. Sproull, particularly because by example, you strike this issue of think carefully, which I spoke to in my opening statement and which I assume everybody has to do, and which Mr. Garfinkel has me confused about. I have been a bureaucrat—bureaucrats are no different from anybody else; it is just that we give them a name because they work for the Government.

But everybody has this tendency, I suppose, to do, for the most part, as much as is expected of them and no more, particularly if it might get them in trouble. So the need is to deal with that phenomenon. But first, let me say something nice about Mr. Garfinkel and ISOO. I think ISOO is doing a wonderful job, but I also think the job they have to do is not very easy. For example, the new Executive order is a bit wishy-washy on what you call portion marking, that is, marking the classification level of each paragraph, and that is an important aid to future declassification, including FOIA cases.

After the new order came out, I am informed, people began to get a little sloppy and did a little less portion marking, but then ISOO came along and raised a stink about it.

Similarly, people began to make less provision for future declassification of their documents. Instead, to quote ISOO's report, "In several cases, there seemed to be rote application of the indefinite timeframe." Again, it was ISOO that had to raise a stink and it took, quote, from the report, "the first half-year or so," before the agencies learned that they could not just mark everything for permanent classification. Now, I think that is why the President wrote to Mr. Garfinkel and complimented him on the tremendous job he was doing and encouraged him to do more of it. And I guess what we are trying to deal with here is how do we help Mr. Garfinkel do an even better job. And I have this practical difficulty in coming to the conclusion that leaving out something in there by way of a test does not have some impact on the judgment that people bring to bear on their responsibilities in the classification system.

I recognize the litigious nature of our society, and I recognize that people jump on every single word. But maybe, Mr. Garfinkel, I need to have you try to tell me, if there were no litigation possibility, and so forth—well, I think you have to admit that there must be that possibility in order to get to the notion of an implied balancing test. Knowing that you might go into litigation, don't you have to be a little more careful about coming to judgment?

Mr. GARFINKEL. First of all, I would like to thank you, Senator, for those kind comments, and if I could simply state that we were doing our job; we were doing nothing more than that.

With respect to your comment, there is one thing that I agreed very much with Mr. Lynch; that is, that the critical time for consideration of whether information should be classified or not is at the time that someone wants access to it. We are aware that there is far too much information that is classified in Government files, but for most of that information, the lack of any researcher interest means that there is really little harm to be paid by society or by the bureaucracy. With respect to information that is requested by members of the public, however, I think that the track record in avoiding overclassification is a tremendous one on the part of agen-

cies. For example, I would refer to exhibit 12 of our annual report. It indicates that with respect to mandatory review cases, those cases in which researchers demand that agencies review their classified documents for purposes of determining their possible declassification, in fiscal year 1983, agencies declassified, in whole or in part, information in over 90 percent of those cases. Now, that 90-percent figure is a barrier that had never been broken before; we had come close.

Also, for fiscal year 1983, we started keeping statistics for the first time in terms of documents and pages declassified, and I think those statistics also bear very favorably on the seriousness with which Government reviewers consider demands for declassification and the productivity with which their reviews result in the disclosure of formerly classified information.

Senator DURENBERGER. OK, but if—and I do not know whether you are a lawyer or not, and I should not even bring that up, because people who are not lawyers always brag about not being lawyers.

Mr. GARFINKEL. I was a lawyer in a previous life.

Senator DURENBERGER. So was I, and that is why I am sensitive to those comments, by now, on lawyers.

If we inject into this process the judicial review language that Mr. Lynch said he would not do, but could understand why we did—in effect, we are changing the test from having the judge try to figure out whether you came to the right conclusion or not, to having the judge determine whether or not you even gave it the test—now, if we do that, and keep in some adjective for damage, and keep in the concept of the balancing test, can you really tell me that we are not going to help you improve the quality of the classification process in our government?

Mr. GARFINKEL. I really do not think the reinstatement of identifiable damage does anything to help us with respect to overseeing the decisionmaking process on individual classification decisions. I do not think original classifiers go beyond the concept of, "Is this going to hurt national security, or is it not going to hurt national security, and what other factors come into play here that bear on my decision?"

With respect to the balancing test, I can tell you this. When we shared a draft of Executive Order 12356 with the Senate Intelligence Committee, among other committees, and that committee recommended that we continue to include a balancing provision in the order, we seriously considered that recommendation. Several of us met with the idea of drafting language that would describe the inherent balance in access decisions, but would not result in the type of harm from litigation that we had experienced under Executive Order 12065. We tried to come up with some language, and we were unsuccessful, at least in the opinion of the experts at the Department of Justice, in coming up with language that would do just that, retain the concept of inherent balance while avoiding the question of judicial interference.

Senator DURENBERGER. Yes, but you have just described the typical—I keep using this word—bureaucratic process of searching for the safe world in which to live, and I do not know that there is such a safe world. That is one of the reasons why we have the sepa-

ration of powers and we have the judicial system to oversee the rest of the process. I do not know that a wholly safe world is there, and we are trying to get as close to it as we can.

Mr. Lynch, did you have a comment?

Mr. LYNCH. Yes, I would like to make a comment on this alleged difficulty that was encountered with the balancing act in litigation. Most litigation involved the question of whether the agencies were obliged to perform a balancing test. The administration, the Justice Department, the agencies, resisted that proposition. They said that under Executive Order 12065, whether to balance was discretionary and totally unreviewable, and almost all the litigation involved whether the agencies had to conduct a balance. There was no case that I know of—and I am pretty sure I know of all of them—where a judge said, "You must disclose this information, because in my view, the public interest outweighs the harm to the national security." That issue has never even arisen, let alone being decided adversely to the government.

So, if they were worried, if they had a problem, it was only the most speculative kind of problem, the sort of worst-case hypothetical that I guess some people are paid to dream up, but do not arise in the real world.

Senator DURENBERGER. OK.

I have, as you can imagine, a number of questions—some from other members of the subcommittee who could not be here. This is my first day on the job on Judiciary, and I am just collecting their questions. If you all do not mind, we will pose those questions in writing and ask you to respond. And as the chairman indicated, I have a number that I did not want to bring up here that are unique to Dr. Sproull, because of his background, that I think would be helpful to have as a part of the record. As you pointed out, they did not quite relate to what was coming from the other three witnesses.

The chairman did indicate that the record would be open for 2 or 3 weeks for testimony from appropriate experts who have something to say on this issue, so we will try to get you the questions, also.

I am informed that anyone who has a comment that they would like to make can do so in writing, and it will be made a part of the record.

And without objection, a statement by Senator Thurmond, the chairman of the committee, will be included in the record after the opening statement by the chairman of the subcommittee; and subsequently, there will be included a statement by Senator Grassley, who was unable to present it at that time.

I thank you all very much for your help on this issue.

The hearing will be adjourned.

[Whereupon, at 11:50 a.m., the subcommittee was adjourned.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

NATIONAL COORDINATING COMMITTEE
FOR THE PROMOTION OF HISTORY

Administrative Offices 400 A STREET SE
WASHINGTON, DC 20003/(202) 544-2422

April 25, 1984

Senator Orrin Hatch
Subcommittee on the Constitution
Russell Senate Office Building
U. S. Senate
Washington, DC 20510

Dear Senator Hatch,

I am writing on behalf of the National Coordinating Committee for the Promotion of History, a consortium of over thirty historical and archival organizations, to request that this statement of support for S. 1335 be added to the record of the April 3rd hearing of the Subcommittee on the Constitution.

Since Executive Order 12356 went into effect on August 1, 1982, historians have encountered with increasing frequency massive deletions, delays, and bureaucratic problems in response to their FOIA requests. Historians recognize that some federal information legitimately requires protection, but the experience of the last few years bears evidence that the classification measures are excessive. "The Annual Report to the President, FY 1983" prepared by the Information Security Oversight Office (ISOO) reports that in 1983 54% of requests for mandatory review actions by agencies were granted in full, 35.4% in part and 9.8% denied. While ISOO makes much of the fact that for the first time the number of cases denied fell below 10%, conversations with historians indicate that more and more documents are coming through review with a line or two at the top of the page and the rest of the page blank. Since these basically blank pages seem to qualify as partial declassification, it is easy to see how the ISOO figures have improved while historians are being deprived access to increasing amounts of government information.

Historians who are especially handicapped by the restriction of information under Executive Order 12356 are those who teach and write about the Korean War, the rising tide of nationalism in the 1950s and 60s and the inexorable manner in which it was enmeshed in the global battle between the "free world" and the Kremlin in such countries as Iran, Egypt, Guatemala, and Cuba. Many historians now realize that they have no assurance that they will have the documents necessary for careful analysis and thoughtful

conclusions. Even the prestigious and invaluable documentary series published by the historical office of the Department of State, Foreign Relations of the United States, must either publish its volume on Korea without the minutes of the National Security Council, and its volume on the American Republics, 1952-54, without any CIA documents, or refrain from publishing at all.

S. 1335 would send from Congress to the security bureaucrats the important message that information should be withheld only if disclosure would cause "identifiable damage" to national security and only if the need for secrecy outweighs the public interest in disclosure. The American Historical Association and the Organization of American Historians, the two largest professional assocations of historians, have both gone on record opposing the the portions of E.O. 12356 that eliminate the balancing test and that introduce the policy of "when in doubt" classifiy. S. 1335 offers a much needed corrective to the overly restrictive E.O 12356.

Jonathan Wiener, a history professor at the University of California at Irvine, requested under the FOIA, FBI information on John Lennon, who figures in a book Wiener is writing on the New Left, popular music and politics. The FBI withheld two-thirds of the files "in the interest of national defense and foreign policy." Lawrence S. Kaplan, director of the Lyman L. Lemnitzer Center for NATO Studies at Kent State University, is researching the formative years of NATO. Since he has been unable to obtain documents for the 1950-54 period, he has had to greatly alter the scope of his study.

The overall impact of E.O. 12356 has been to reverse the trend toward openness. The public's right to know is being threatened and its ability to understand government policies and weigh alternatives is being infringed upon. The closing of the nation's records not only hinders scholarship but limits our view of the present and the future. We therefore strongly support S. 1335.

Sincerely,

Page Putnam Miller

Page Putnam Miller, PhD
Director

Enclosure: American Historical Association Statement on Security Classification of Documents and Executive Order 12356

ORGANIZED 1884 INCORPORATED BY THE CONGRESS 1889

American Historical Association

400 A STREET S.E. WASHINGTON, D.C. 20003 | 202-544-2422

Statement on Security Classification of
Documents and Executive Order 12356
Approved by the Council of the American Historical Association
December 27, 1982

The security classification system of the United States has gone through several stages. For current purposes, the key facts are the following. The Atomic Energy act of 1954 covers documents in the atomic energy and weapons area; it provides a Congressionally mandated classification and declassification system; has remained essentially as established in 1954; and has been left at least theoretically untouched by the various Presidential Executive Orders which cover all other US government records. Executive Orders on classification have been issued by several presidents. The most important for understanding current issues are 10501 (Eisenhower, 1953); 11652 (Nixon, 1972); 12065 (Carter, 1978); and 12356 (Reagan, 1982).

10501 reduced the old 4-tier system (Top Secret, Secret, Confidential, Restricted) to a 3-tier one by eliminating Restricted. 11652 tightened the standards for classification, provided for definite time limits for classification, vastly increased the automatic declassification review potential of the National Archives, and established an Interagency Classification Review Committee to

which scholars could appeal agency classification actions. 12065 reduced the nominal maximum initial classification period from 30 to 20 years; was phrased generally to stress a preference for keeping records open; prohibited the closing of records once open; replaced the Interagency Classification Review Committee with the Government Security Oversight Office; and -- most important for scholars -- required the inclusion of a declassification date or event in the initial classification, thus shifting the eventual massive burden of work from the process of opening records to that of keeping them closed beyond the initial period.

The new Executive Order 12356, which went into effect on August 1, 1982, reverses the whole pattern and trend of prior orders. It requires that in any case of doubt, the documents be closed, and at the highest level of classification applicable; it eliminates the requirement for a date or event for opening without further action; it makes the normal closing period 30 years with an indefinite maximum even in initial classification; it authorizes -- if it does not encourage -- the re-closing of records that have previously been declassified; and generally shifts all the presumptions in favor of secrecy. The new order nominally maintains some authority for systematic declassification by the National Archives in general government records and presidential papers, but the elimination throught the budgetary process of a majority of the positions in the Archives allocated to declassification review in fact drastically reduces the ability of the Archives to carry out such reviews while the new rules enormously increase the difficulty -- and hence the work load -- of the declassification process.

The overall impact of the new Executive Order will presumably be to reverse the trend of the last decade. Systematic review of classified records will be greatly reduced, and what reviews are carried out will be slower. New records created by government agencies will be more likely to be classified and at a higher level of classification. The authority to close records previously opened will most likely lead to many recently opened records for the period 1945-52 being closed again. The longer, even indefinite, terms for which records can be classified and the elimination of the requirement --- for which the AHA had long argued -- that a declassification date be included in all initial classification actions, will combine to guarantee an annual increase in the volume and the percentage of government records closed to the public, with no end in sight to this process.

An additional problem results from the fact that in recent years the term "Foreign Government Information" in the executive order governing security classification has been used as a catch-all category for the closing of all manner of American documents on the basis of their contents as well as interminable delays in their declassification. The prior practice of applying that term only to documents physically originating from other governments and transmitted to the U.S. government simplified the process of declassification, maintained the principle that our government fully controls its own records, and enabled our government to set an example for others in facilitating intelligent discussion of government policy by making records available after a reasonable interval. The U.S. should return to that prior practice.

The new policy direction poses enormous dangers for our country: the public's right to know is being drastically threatened and its ability to understand government policies and weigh alternatives is being gravely infringed upon. The new procedures are designed to get the people off the government's back by denying them access to the nation's records. This strikes at the foundations of the democratic process. The closing of the country's records will not only hinder scholarship immensely, but it will becloud our view of the present and the future. Intelligent discussion and assessment of the choices facing the nation require that more, not less, information be accessible. Hiding our past can only darken our future.

The American Historical Association urges a revision of classification policy along the following lines:

1. The presumption should be that records be opened, not closed; in case of doubt, the public's right to know must prevail.

2. All classification actions must embody an initial terminal date. Only a shifting of the burden of page-by-page review and restamping for those who want records opened to those who want them kept closed for even longer periods will ever reduce the growing mountain of classified files.

3. We favor a reduction of the base initial classification period from 30 to 20 years; the inclination on first classification is always to use the longest period available, and 20 years should be adequate for that. Extension on item review can always protect documents truly in need of classification for more than 20 years.

4. Any authority to close records previously opened must be most severely circumscribed to restrict its use to the correction of individual and identifiable errors in regard to specific documents.

5. The capability of the National Archives to implement systematic declassification review must be guaranteed by a system of position allocations to the National Archives geared to the volume of classified files generated by government agencies, with such allocations charged to the budgets of the agencies generating the classified records. There is little prospect of ever coping with the mounting piles of secret files unless there are both rules that make review a feasible process and budget procedures which give to those responsible for creating classified records some incentive to exercise restraint and to the Archives a real, not just theoretical, opportunity to do its job.

6. The practice of interpreting the term "Foreign Government Information" in the classification system as applying to the content of documents as opposed to their physical origin must cease. Only documents actually originated by foreign governments should be treated as "Foreign Government Information," with all other handled in accordance with the classification rules governing American government generated records. The United States should resume its leadership in regard to the public's right of access to public records.

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STATEMENT OF
THE ASSOCIATION OF AMERICAN PUBLISHERS, INC.
CONCERNING SENATE BILL 1335

TO: Committee on the Judiciary
Subcommittee on the Constitution
United States Senate

June 25, 1984

Background

The Association of American Publishers, Inc. ("AAP"), the major trade association of book publishers in the United States, submits this statement for inclusion in the record of the hearings of this subcommittee on Senate Bill 1335, the Freedom of Information Protection Act. For the reasons we discuss below, AAP wholeheartedly endorses S. 1335's effort to place in sensible and sensitive balance the interests of national security, on the one hand, and the public's right and need to be informed, on the other, in the context of existing document classification policies of the Executive Branch.

AAP's more than 300 members are responsible for the publication of numerous prominent works concerning government, foreign and domestic policy, military and diplomatic affairs, and history. Many of the books published by AAP's members are written by scholars, researchers and journalists, as well as by present and former government employees and consultants. When writing about such affairs of government, these authors are dependent to a critical degree upon government-generated material. Such material informs public debate and enables citizens, as the collective sovereign, actively to participate in the conduct of the nation's affairs. A

fertile source of governmental information for such works has been material made available under the Freedom of Information Act ("FOIA") -- a law which stands as eloquent testimony to this nation's commitment to an open governmental process and whose importance to book publishers and their authors cannot be overstated.[1]

AAP's members are at the same time not insensitive to the need to protect certain information generated or collected by the government, important to the protection of the nation, from public disclosure for appropriately limited periods of time. But they are seriously concerned over the impact that Executive Order 12356, which presently governs the classification and declassification of information within the Executive Branch, is likely to have upon the balancing process so necessary in evaluating the propriety of withholding specific information from the public.

Executive Order 12356, when issued in April, 1982, reversed a 30-year trend toward reducing the amount of information both initially classifiable and subject to continuing classification. In a stark turnabout from the Carter Administration's Executive Order 12065, which it replaced, Executive Order 12356, among other provisions, eliminates the requirement that officials consider the public interest in judging how to classify information or whether to release it, and authorizes officials to classify documents without basing

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1. In this connection, AAP has documented, in prior submissions to other congressional committees concerned with proposals to amend FOIA, some of the important works published in the recent past by AAP's publisher members whose vitality depended in large measure upon information released under FOIA. AAP is prepared to provide such information to the subcommittee should the subcommittee feel it may be useful.

their decision on any "identifiable" potential damage to national security.[2]

As matters now stand, all documents classified under Executive Order 12356 may be withheld from the public under the FOIA's classification exemption -- section 552(b)(1) of Title 5 of the United States Code. That statutory provision calls for exemptions from disclosure of any document which has been properly classified pursuant to the governing Executive Order. In the pro-secrecy environment invited by Executive Order 12356, potentially millions of documents deserving of public disclosure may be subjected to the censor's classification stamp and so sequestered from the public.[3] To AAP and its members, such opportunity for widescale classification abuse, with its

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2. Other aspects of Executive Order 12356 of concern to AAP and its members, and as to which AAP has previously commented in submissions to the Congress, include: its failure to provide for automatic declassification even where the classified information at issue has already been publicly disclosed; its leeway for the reclassification of previously declassified information; its elimination of the requirement that classified information be reviewed for declassification after six years; its authorization for the classification or reclassification of unclassified material after a request for it has been received under FOIA; and its development of several new categories of classifiable information.

3. We note that the Annual Report to the President prepared by the Information Security Oversight Office concerning the status of classification within the Executive Branch purports to present data demonstrating Executive Order 12356's success in containing classification activity. That same report, however, demonstrates an increase in overall classification activity and a significant decline in agency monitoring of their own classification determinations -- a development that the report terms "unfortunate" and which "call[s] into question both the quality and quantity of agency inspection programs."

attendant consequences upon the full discussion of governmental affairs, should not be left unchallenged.

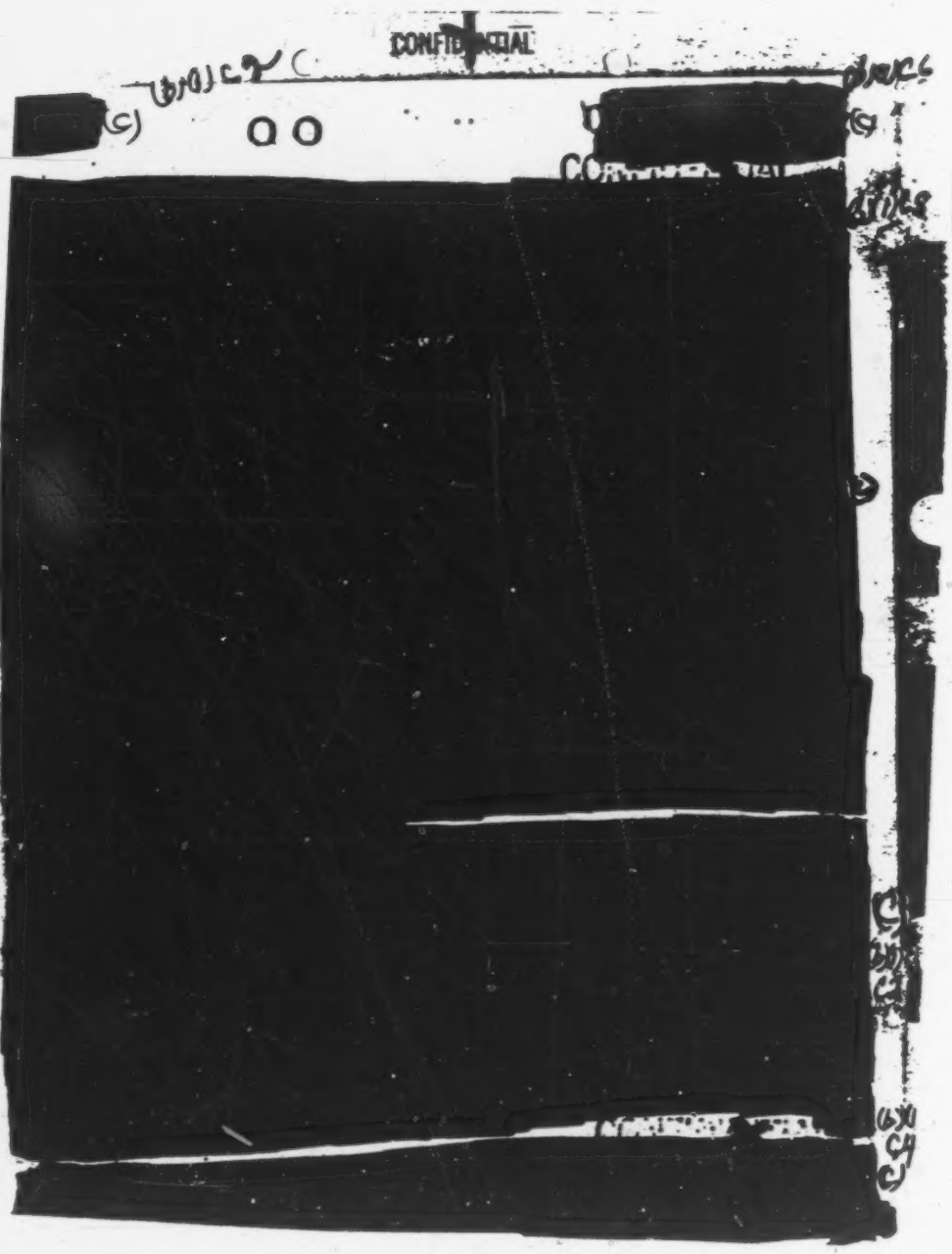
S. 1335

S. 1335 represents a welcome effort to reaffirm the principle -- seemingly abandoned by the Reagan Administration -- that classification of government information in the context of an open democratic society should be the exception and not the rule. S. 1335 would simply and clearly express the will of the Congress that section 552(b)(1)'s reliance on implementation by an Executive Order is not meant to permit agencies to withhold any and all information without consideration of the public interest. S. 1335 accomplishes this objective by: (1) pursuant to proposed section 552(b)(1)(B), requiring an agency to identify the potential damage to the national security that disclosure of classified information to a FOIA requester might involve; and (2) pursuant to proposed section 552(b)(1)(C), requiring the agency to weigh "the need to protect the information" against "the public interest in disclosure."

By requiring an agency to meet the foregoing standards -- identifying potential damage to the national security that disclosure might bring about and balancing the need for protection against the public interest in disclosure -- S. 1335 would subordinate an agency's predictable interest in secrecy to a showing that that interest is grounded in genuine need. Such burden as may be imposed by requiring such an analysis by an agency facing a FOIA request is more than justified by the societal benefits to be gained from such a process.

AAP views the passage of S. 1335 as significant to the vitality of the publishing process, to the public interest in the workings of our government, and to the principles which underlie our democracy.

We thank the subcommittee for this opportunity to express our views on this important subject.



ANPA
TO ADVANCE THE CAUSE OF A FREE PRESS
American Newspaper Publishers Association
The Newspaper Center, Box 17407, Dulles International Airport, Washington, D.C. 20041
Executive Offices: Reston, Virginia (703) 620-9500

April 17, 1984

Senator Orrin G. Hatch
Chairman, Constitution Subcommittee
United States Senate Judiciary Committee
Room SD-212
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

The undersigned press organizations have appeared before your Subcommittee on the Constitution on numerous occasions to express our support for the federal Freedom of Information Act. We take this additional opportunity, as the subcommittee considers S. 1335, to reiterate that support and to urge passage of that bill.

Recent American presidents have viewed with great consternation the epidemic of government classification spreading through documents that could and should add to the public's understanding of its government. From President Eisenhower to the present, administrations have worried over ways to restrict the security classification only to those documents for which it was truly needed.

With those concerns so repeatedly recorded by past administrations, we were perplexed by President Reagan's decision in 1981 to turn back the clock by removing the identifiable harm standard from the government's classification process. On this point, the public interest specifically was written out when Executive Order 12356 took effect.

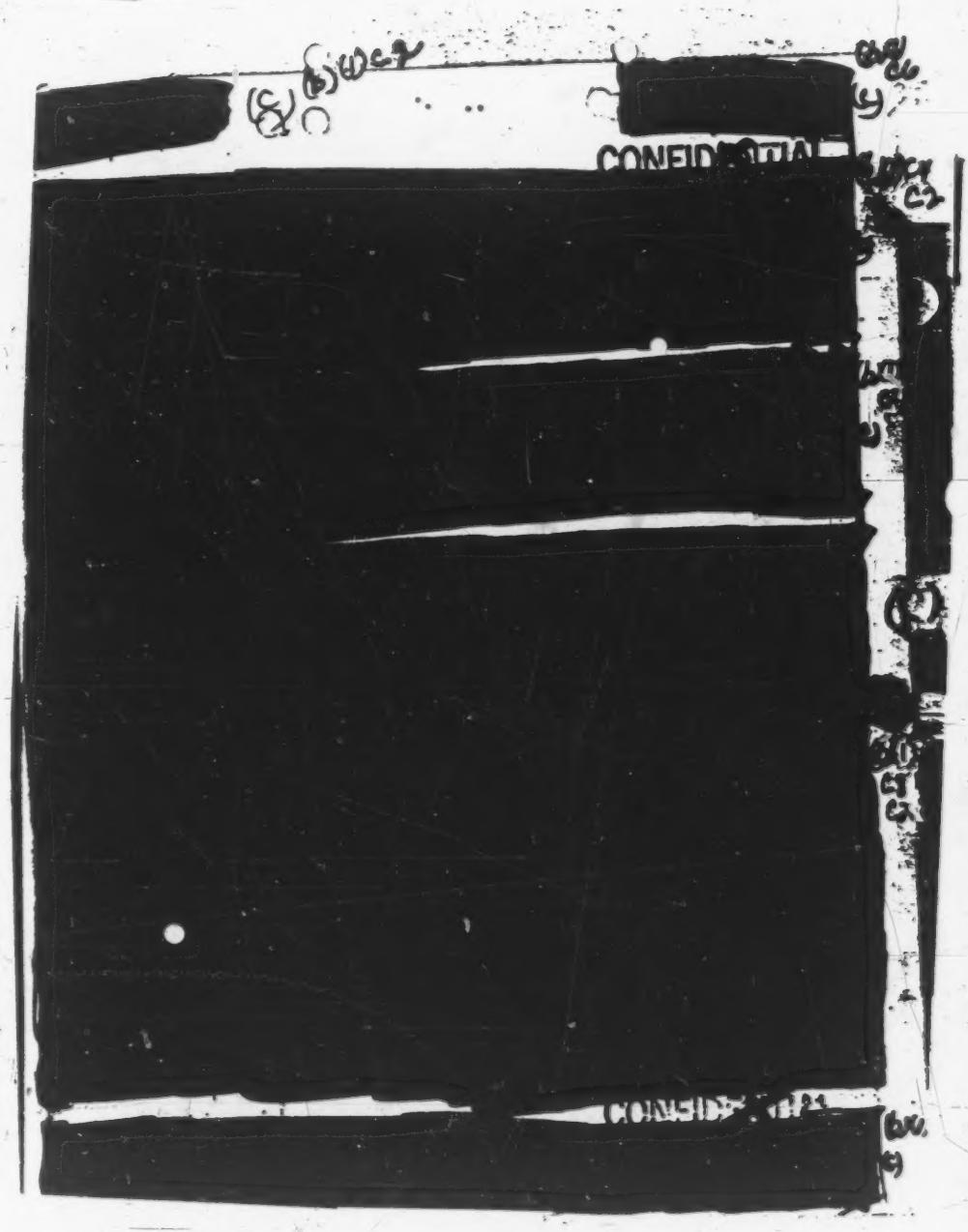
Senator Durenberger's bill to reintroduce the identifiable harm standard, only to those documents requested under the Freedom of Information Act, is a sensible approach to restoring the balance between secrecy and openness in the public interest. It would require agencies to conduct the balancing review process only for those records in which a member of the public has exhibited interest and would avoid massive and expensive reviews of all documents.

Establishing workable rules that sufficiently protect security concerns but encourage open government is a perpetual difficulty in a free society. But it is not an impossibility. We appreciate the efforts of your subcommittee to address this matter. We hope the subcommittee will be able to turn its attention in this Congress to moving the bill toward enactment.

Creed Black
Creed Black
President
American Society of Newspaper Editors

Robert Brinkmann
Robert Brinkmann
General Counsel
National Newspaper Association

Charles S. Rowe
Charles S. Rowe
Chairman
ANPA First Amendment/FOI Working Group



STATEMENT OF THE NATIONAL COMMITTEE AGAINST REPRESSIVE LEGISLATION BY STEPHANIE T. FARRIOR, ESQ., NCARL WASHINGTON COORDINATOR

The National Committee Against Repressive Legislation is a citizens education/action organization which focuses primarily on the defeat or repeal of legislation which infringes on the First Amendment rights of free speech, press and association. To that end, NCARL's representatives have testified before Congressional Committees, addressed college and civic groups, organized conferences and debates, and published and distributed literature.

NCARL believes that the Freedom of Information Act is essential to the maintenance of a free and democratic society. It is one of the primary safeguards against illegal and improper government conduct.

The attached documents are dramatic testimony to the severe weakening of the Freedom of Information Act by Executive Order 12356 (1982). These documents also demonstrate the need for legislation such as S. 1335 in order to restore some strength to the Act.

The first several pages of the attached material are typical of documents NCARL received through the Freedom of Information Act prior to implementation of Executive Order 12356. They reveal some of the COINTELPRO activities used against NCARL for fifteen years.

The next several pages are representative of over 7,000 documents NCARL has received since implementation of the Executive Order. Of these pages, two-thirds were totally obliterated. Only about ten percent of the documents show anything more than the date and authorship. The justification given in the cover letter accompanying the documents for this sudden and striking reversal of policy was Executive Order 12356.

[redacted]

CONFIDENTIAL

NCARL first used the Freedom of Information Act in 1975 when it requested documents from the FBI concerning a 1969 burglary of NCARL's Los Angeles office, as well as documents relating to NCARL and its then Executive Director, Frank Wilkinson. After a two year delay, NCARL received the first 4,500 pages. Although heavily expurgated, the documents revealed that NCARL had been a target of an FBI COINTELPRO program since its founding in 1960 as the National Committee to Abolish the House Un-American Activities Committee. From these documents NCARL learned that the FBI had a secret campaign to "disrupt and discredit" NCARL's work. A Dec. 2, 1960 FBI memorandum states:

> "The following counterintelligence action is aimed at discrediting and disrupting the activities of the National Committee to Abolish the House Un-American Activities Committee."

An FBI memorandum dated October 9, 1962 instructed field offices to:

> "be alert for counterintelligence operations that might be effectively employed concerning these various speaking engagements of Wilkinson. Any operation that could be employed as a disruptive tactic should be furnished to the Bureau setting forth complete details regarding the proposed operation...."

The documents reveal that the FBI spent much time on disruption of Wilkinson's speeches. A September 27, 1962 FBI memorandum cautions:

> "The utmost discretion will be necessary to avoid any basis for the allegations that the Bureau is conducting investigations on college campuses, or interfering with academic freedom."

It was not the interference with academic freedom that concerned the FBI, but rather that such activities might be exposed.

Other documents revealed that the FBI encouraged news media sources to defame NCARL and illegally provided "friendly" journalists with information from the Bureau's confidential investigative files; prepared "poison pen" letters and other documents, falsely attributing authorship to NCARL; disrupted

NCARL's public appearances by use of hecklers and pressured various forums to cancel invitations to Wilkinson to speak; and so on.

The Justice Department consistently informed the FBI that its prosecutive reports were completely insufficient to warrant prosecution of NCARL under any of the legislative provisions allegedly justifying the FBI investigation. Yet the FBI Director proceeded to order continuation of the "investigation."

Rather than allow the open debate of government policy so essential to our democratic process, the documents NCARL has received through FOIA show that the FBI did its best to thwart that process. It is to protect against these abuses that the Freedom of Information Act must remain strong.

For this reason also, it is crucial that the obligation to produce reasonably segregable nonexempt portions of documents be retained in the Act. This requirement is essential to the Act's function as a safeguard against illegal and improper government acts. Even limited disclosures act as an important deterrent to the return of the abuses of the COINTELPRO program.

The Executive Order 12356 (1982) on classification, however, has so severely weakened the FOIA as to almost nullify it.

Restoration of meaningful judicial review of an agency denial of access to records, as proposed in S. 1335, is an important step to restoring an Act which is essential if we are to protect against unjustifiable government secrecy, deter agency misbehavior, and allow our country's democratic processes to function with an informed citizenry.

1 - Mr. Ware
1 - Mr. Kleinkauf
April 30, 1962

Airtel

To: SACs, Chicago
Cincinnati
Cleveland
Detroit
Los Angeles
Milwaukee
Newark
New York
Washington Field

From: Director, FBI (100-433447)-196

REC-57

NATIONAL COMMITTEE TO ABOLISH THE
HOUSE UN-AMERICAN ACTIVITIES COMMITTEE
INTERNAL SECURITY - C

[redacted]

Offices receiving instant communication are instructed to be alert for counterintelligence operations that might be effectively employed concerning these various speaking engagements of Wilkinson. Any operation that could be employed as a disruptive tactic should be furnished the Bureau setting forth complete details regarding the proposed operation; however, such an operation should not be placed into effect without specific Bureau authorization. In view of the time element involved in connection with the early stages of Wilkinson's tour, Bureau authorization should be requested by appropriate communication.

MAIL ROOM
APR 30 1962
COMM-FBI

JHK:mar
(21)

51 MAY 9 1962

MAIL ROOM TELETYPE UNIT

EXHIBIT 1

FBI

Date: 5/2/62

Mr. Tolson
Mr. Belmont
Mr. Mohr
Mr. Callahan
Mr. Conrad
Mr. DeLoach
Mr. Evans
Mr. Malone
Mr. Rosen
Mr. Sullivan
Mr. Tavel
Mr. Trotter
Tele. Room
Miss Holmes
Miss Gandy

nit the following in _____ (Type in plain text or code)

AIRTEL _____ (Priority or Method of Mailing)

TO: DIRECTOR, FBI (100-433447)

FROM: SAC, WFO (100-37885)

NATIONAL COMMITTEE TO ABOLISH THE
HOUSE UN-AMERICAN ACTIVITIES COMMITTEE (NCAHUAC)
IS-C
(OO:LA)

REC-23

ReBuairtel, 4/30/62, which instructed receiving offices to be alert for operations which could be employed as disruptive tactics at speaking engagements of FRANK WILKINSON, Field Representative of the NCAHUAC. WILKINSON is to speak in Washington, D.C., on 5/4/62.

WFO submits the following for consideration by the Bureau:

It is proposed that contact be made with a friendly newspaperman with the approach that an interesting story could probably be developed by having an "inquiring reporter" interview people who are arriving at the All Souls Unitarian Church, Pierce Hall, 15th and Harvard Streets, N.W., Washington, D.C., on the night of 5/4/62 at approximately 8:00 p.m. This is the site of the meeting sponsored by the Washington Area Committee for the Abolition of the House Un-American Activities Committee (WACAHUAC), at which FRANK WILKINSON, CARL BRADEN and LEONARD W. HOLT are scheduled to speak. At this meeting an award is to be presented to CLARENCE PICKETT of the Friends Committee on Social Legislation. A leaflet put out concerning this meeting is attached to the original of this airtel. A copy of this leaflet is attached to each additional copy of this airtel.

ENCLOSURE

REC-23 100-433447-198

3-Bureau (5-[illegible])
2-Los Angeles (100-59609) (Info) (RM)(AM)(ENC.1)
2-WFO
(1-100-[illegible] (WACAHUAC) LA-105

MAY 3 1962

EBG:nam
(8)
AIRTEL

MAY 11 1962

Sent _____ M Per _____

C. WICK Special Agent in Charge

EXHIBIT L

WFO 100-37883

BRADEN and WILKINSON are described in the leaflet as "nationally-known leaders in Civil Rights and Civil Liberties cases, who recently served one-year contempt sentences in using the First Amendment against the witch-hunting House UnAmerican Committee." HOLT is described as a "prominent Norfolk attorney, and articulate spokesman in Virginia cases involving CORE (Congress on Racial Equality) and Southern Christian Leadership."

If the "inquiring reporter" is at the entrance to the Hall on 5/4/62 at 8:00 p.m., he will be in a position to interview and identify individuals who are going to attend the meeting. If he should pose such questions as, "may I have your name and address?";"why are you attending this meeting?"; "do you know CARL BRADEN or FRANK WILKINSON?" or "are you active in any organization supporting the program of the WACAHUAC, which is sponsoring this meeting?", it is possible that some of the individuals who are entering the Hall may leave, rather than take the chance of exposure in the press. The Washington, D.C. area is a particularly sensitive area with regard to publicity for organizations in opposition to HCUA and possible affiliation with organizations which are tinged by communist infiltration.

For the additional information of the Bureau, the 5/1/62 edition of the "Washington Afro American," on Page 12, carried an advertisement announcing the above-described meeting, which is an indication of the wide-spread publicity being given this affair. In addition to the announcement, [redacted] has advised that 6,500 copies of the attached leaflet have been prepared for distribution in this area.

-2-

EXHIBIT L

October 9, 1962

Airtel 1 - Mr. Ware

To: SACs, Los Angeles (100-54554)
, Minneapolis (100-1878-FFF)
Omaha

From: Director, FBI (100-3-104-26)

COMMUNIST PARTY, USA
COUNTERINTELLIGENCE PROGRAM
INTERNAL SECURITY - C

[redacted]

Frank Wilkinson, Executive Director, National Committee to Abolish the House Un-American Activities Committee. Copies of rearirtel have been designated for all offices receiving this communication.

Wilkinson's tour is planned to support the communist cause as part of the current strategy of the Communist Party. Gus Hall, General Secretary, Communist Party, USA, wrote in the September, 1962, issue of "Political Affairs," the theoretical organ of the Communist Party, USA, that the central theme on the idealogical front is the battle against anticommunists and one of the most effective means is speeches on college campuses.

Each office to which copies of this airtel are directed should give careful consideration to possible counterintelligence plans to disrupt the schedule of Wilkinson. The utmost discretion will be necessary to avoid any basis for allegations that the Bureau is conducting investigations on college campuses, or interfering with academic freedom.

Submit all suggestions to the Bureau for approval before initiating any action on them in accordance with our current Counterintelligence Program procedures.

(1) - 100-433447 (NCAHUAC)

ORIGINAL FILED IN 100-3-104-26-52

ARW:cdb
(9)

SEE NOTE ON YELLOW PAGE TWO

100-433447-

NOT RECORDED
201 OCT 12 1962

DUPLICATE YELLOW

EXHIBIT N

4 OCT 16 1962

Memorandum to Mr. Sullivan
Re: National Committee to Abolish
the Un-American Activities Committee
100-433447

[redacted]

The above information has been disseminated to the Department and the intelligence agencies of the Armed Forces. Both captioned organization and MACMUAC are under investigation and copies of reports concerning the investigations are being furnished to the intelligence agencies of the Armed Forces and the Department for its consideration pursuant to Executive Order 10450 and the Internal Security Act of 1950.

[redacted]

RECOMMENDATION:

It is recommended that this memorandum be referred to Mr. DeLoach for appropriate action in connection with exposing the setting up and purposes of the Legislative Office of captioned organization.

We are closely following this matter not only from the standpoint of determining pertinent activities of captioned organization and Allen but also to determine what further counterintelligence activities we will be able to utilize as a disruptive measure.

- 2 -

EXHIBIT U

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (100-433447) DATE: 3/22/63

FROM : SAC, LOS ANGELES (100-59609)

SUBJECT: NATIONAL COMMITTEE TO ABOLISH
THE HOUSE UN-AMERICAN ACTIVITIES
COMMITTEE (NCA HUAC)
IS-C; ISA-50

Re Supplemental Prosecutive Summary report of [redacted] dated 2/7/63, at Los Angeles, captioned as above.

A thorough review has been made of the information received since rerep by the Los Angeles Office, concerning the NCAHUAC. During this review, insufficient information was noted which would indicate direction, domination or control by the Communist Party (CP), USA of the NCAHUAC, and insufficient information was noted indicating aid and support of the CP-USA by the NCAHUAC, to warrant submission of an additional supplemental prosecutive summary report at this time.

This matter continues to be followed closely by the Los Angeles Office in an attempt to secure pertinent prosecutive information.

In view of the above, UACB, an additional review will be made in forty-five days and the Bureau will be advised of the results thereof, or receive a supplemental prosecutive summary report in this matter on 5/7/63.

cc Dean Jones

(2) - Bureau (Registered)
1 - Los Angeles

WRW/slw
(3)

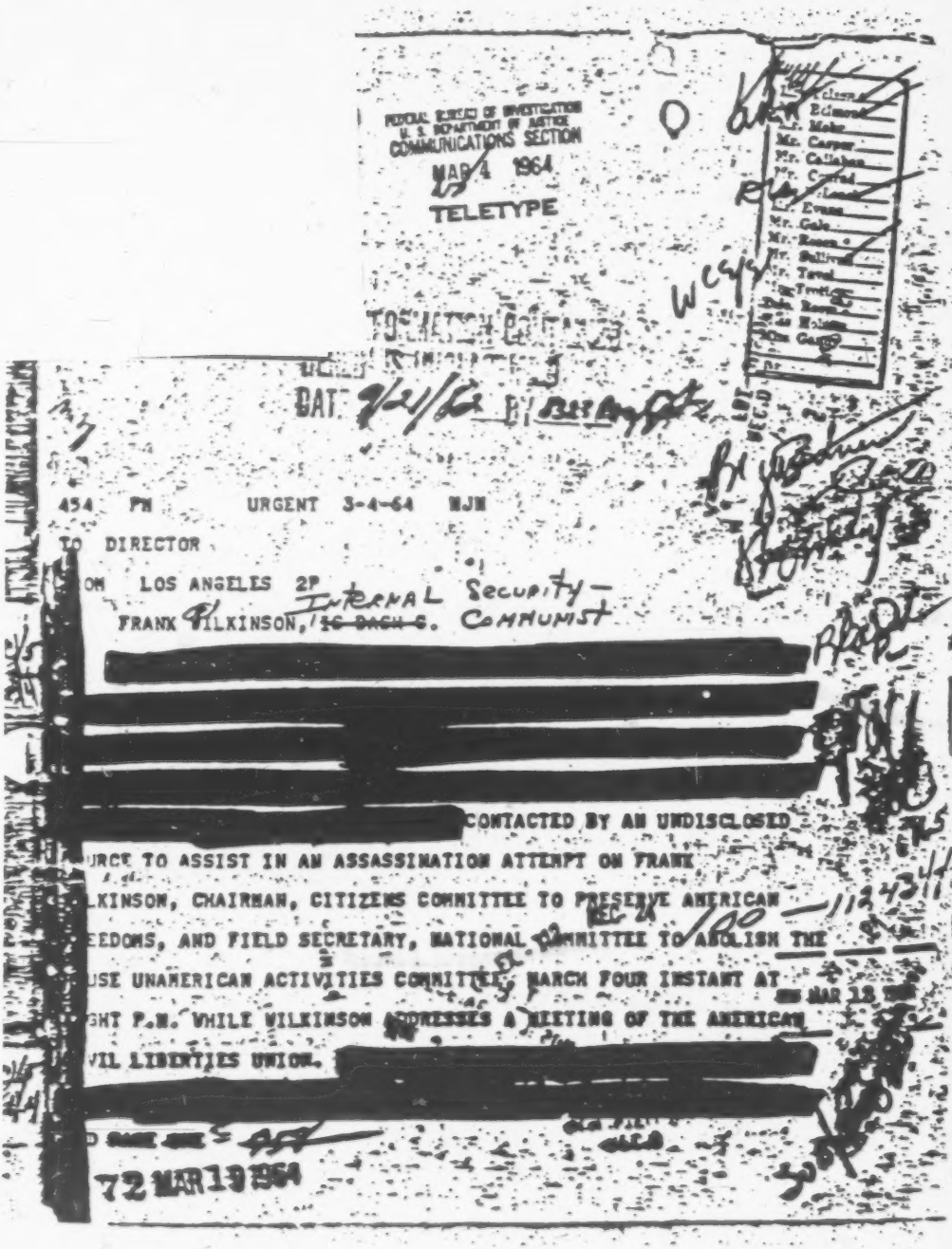
REC-51 100-433447-35

EX-110

MAR 29 1963

EXHIBIT KK

SAC



FEDERAL BUREAU OF INVESTIGATION
U. S. DEPARTMENT OF JUSTICE
COMMUNICATIONS SECTION

MAR 4 1964

TELETYPE

DAT 3/4/64 BY

454 PM URGENT 3-4-64 WJH

TO DIRECTOR

FROM LOS ANGELES 2P

FRANK WILKINSON, ~~IC DACH C~~. INTERNAL SECURITY - COMMUNIST

[redacted]

[redacted] CONTACTED BY AN UNDISCLOSED

SOURCE TO ASSIST IN AN ASSASSINATION ATTEMPT ON FRANK

WILKINSON, CHAIRMAN, CITIZENS COMMITTEE TO PRESERVE AMERICAN

FREEDOMS, AND FIELD SECRETARY, NATIONAL COMMITTEE TO ABOLISH THE

HOUSE UNAMERICAN ACTIVITIES COMMITTEE, MARCH FOUR INSTANT AT

EIGHT P.M. WHILE WILKINSON ADDRESSES A MEETING OF THE AMERICAN

CIVIL LIBERTIES UNION.

[redacted]

72 MAR 19 1964

GE TWO

[redacted] AS ADVISED OF FOREGOING

D ALSO ADVISED WILKINSON SCHEDULED TO SPEAK ON WEDNESDAY,

RCH FOUR INSTANT, EIGHT P.M. AT HOME OF DR. ALAN NEIMAN,

E THREE ONE THREE ZERO BLOOMFIELD, SHERMAN OAKS, CALIF.,

DER AUSPICES OF AMERICAN CIVIL LIBERTIES UNION, SAN

RNANDO VALLEY CHAPTER. [redacted]

S FURNISHED PERTINENT INFORMATION TO [redacted]

[redacted] AND WILL STAKEOUT RESIDENCE

DR. NEIMAN. MATTER WILL BE CLOSELY FOLLOWED AND

RTINENT DEVELOPMENTS PROMPTLY REPORTED.

D

CCN

I WASH DC

CC-MR SULLIVAN

FEDERAL BUREAU OF INVESTIGATION
U. S. DEPARTMENT OF JUSTICE
COMMUNICATIONS SECTION

MAR 5. 196

TELETYPE

FBI WASH DC

DATE 3/5/64 BY

FBI LOS ANG.

150 PM URGENT 3/5/64

TO DIRECTOR

FROM LOS ANGELES 100-16439 1P

FRANK WILKINSON. IS DASH C.

RE LOS ANGELES TELETYPE MARCH FOUR LAST.

[redacted]

THAT NO ATTEMPT HAS BEEN MADE ON THE LIFE OF WILKINSON AND THERE HAVE BEEN NO FURTHER DEVELOPMENTS IN THIS MATTER.(U)

END

LRA

FBI WASH DC

CC-MR [illegible]

64 MAR 12 1964

REC 112 100-112434-154

8 MAR 6 1964